As many who took advantage of the "small partnership exception," it became a useful tool in many other situations as well.[9]

What are the options now?

With the "small partnership" now unavailable, what are the options"?

Follow the partnership rules. Many small firms will find the partnership rules unbelievably complex for their firm. It demands not only outside assistance, it injects numerous rules that seem totally foreign to taxpayers.

Shift to joint tenancy or tenancy in common. With the dramatic increase in the federal estate tax exemption, these co-ownership possibilities may look quite attractive. For many farm and ranch firms, the federal estate tax exemption is much higher than they would have expected it to be prior to 1998. Remember, the increase to the present level is not assured beyond 2025.

It may be necessary to change land titles, which usually involves a fairly modest cost.

Consider a sole proprietorship. It may be possible to split the business and operate as two sole proprietorships (if, for example, it is a father-son operation).

How about an LLC? A "limited liability company" (or LLC for short) may look attractive but it is likely to be taxed as a partnership, resulting in no advantage in this area inasmuch as the "small partnership" exception, now eliminated, is not likely, it seems, to be re-enacted.

Watch out for traps that trigger taxation on the transfer

Keep in mind that the IRS regulations make it clear that the tax treatment of a change in classification of an entity for federal tax purposes is determined under the Internal Revenue Code and general principles of tax law.[10] Numerous private letter rulings, although relatively low level authority, provide useful insight into where the regulations and prior letter rulings provide relative safety in avoiding triggering unwanted tax consequences.

In general, for example, a partnership can be converted to an LLC without recognition of gain – or loss. But you may still be subject to partnership taxation with the LLC.

Any chance of re-enactment?

The possibilities of re-enactment of the "small partnership exception" appear to be slim at the moment. It will require strong support from Congress and a shorter leash on the Joint Committee on Taxation who erroneously insisted at various times that "there is no such thing as a small partnership exception."

ENDNOTES

[1] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 1101(a), 129 Stat. 584 (2015).

[2] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 402(a), 96 Stat. 324 (1982), *enacting* I.R.C. § 6231(a).

[3] *Id.*

[4] I.R.C. § 6231(a)(1)(B)(1), before repeal as noted above.

[5] Pub. L. No. 105-34, § 1234(a), 111 Stat. 788 (1997).

[6] Rev. Proc. 81-11, § 2.04, 1981-1 C.B. 651, *modified and superseded by* Rev. Proc. 84-35, 1984-1 C.B. 509.

[7] I.R.C. § 6231(a)(1)(B)(ii).

[8] I.R.C. § 6231(a)(1)(B)(ii).

[9] See Harl, "Farm Estate and Business Planning: Annotated Materials, p. 13-11 (2017); Harl, *Agricultural Law*, § 60.01[1][b][iv] (2018).

[10] Treas. Reg. § 301.7701-3(g)(2)(i).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

HORSES. The plaintiff was injured while taking a riding lesson from the defendant stables. Prior to the lesson, the plaintiff signed a release that provided that the "[u]ndersigned assumes the unavoidable risks inherent in all horse-related activities, including but not limited to bodily injury and physical harm to horse, rider, employee and spectator." The defendant stables moved for summary judgment based on the doctrine of assumption of risk and the signed release. The plaintiff moved to dismiss the defendant's affirmative defense of assumption of risk and to void the release as contrary to state law. The plaintiff argued that an exception applied in this case to the doctrine of assumption of risk because the defendant failed to properly instruct the plaintiff based on the plaintiff's skill, physical ability and experience and failed to properly tack the horse. The trial court agreed in part with both parties and ruled that there were material issues of fact whether the doctrine of assumption of risk applied in this case and that the release was not void and unenforceable under state law. The assumption of risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks. However, the doctrine of assumption of the risk will not bar liability if the risk is unassumed, concealed, or unreasonably increased. The appellate court found that the pre-trial evidence raised questions of fact whether the defendant unreasonably increased the risks associated with mounting the horse by failing to give plaintiff adequate instructions and assistance based on the plaintiff's size, athleticism, and obvious struggles in attempting to mount the horse, and whether there were concealed risks of mounting the horse, i.e., whether the horse was tacked properly. Apparently, the saddle slipped during the ride but the case does not describe how this contributed to the injury. Thus, the appellate court held that summary judgment on the application of the doctrine of assumption of risk was premature. Under New York General Obligations Law § 5-326, contracts exempting recreational facility owners from liability are void and unenforceable. However, the appellate court cited case law which established an exception: "where a facility is used for purely instructional purposes, section 5-326 is inapplicable even if the instruction that is provided relates to an activity that is recreational in nature." *Tiede v Frontier Skydivers, Inc., 964 N.Y.S.2d 326 (N.Y. Sup. 2013)*. The appellate court found that summary judgment on this issue was improper because the pre-trial evidence showed that the plaintiff enrolled in a course and paid tuition for instruction, with any recreational use of the defendant's horse and facility as incidental to the main instructional purpose of the activity. One justice dissented, arguing that the assumption of risk doctrine applied in this case without factual question in that injury from falling off of a horse, including saddle slippage, was a common known risk of horseback riding. **Jones v. Smoke Tree Farm, 2018 N.Y. App. Div. LEXIS 3212 (N.Y. Ct. App. 2018)**.

BANKRUPTCY

GENERAL

AVOIDABLE TRANSFERS. The debtor was a partnership which operated a wheat farm. The debtor filed for Chapter 11 on October 23, 2014, later converted to Chapter 7. On May 7, 2014 the debtor entered into two wheat contracts with a grain brokerage firm with total delivery of 10,000 bushels of wheat from June 1, 2014 through July 31, 2014 in exchange for $6.78 per bushel for 5,000 bushels and $7.09 per bushel for the other 5,000 bushels. The debtor delivered 6,533.67 bushels on July 21, 2014 and 4,279.4 bushels on August 4, 2014. The brokerage firm issued a check on August 11, 2014 to the debtor for $71,957.10. The prices were based on current fair market value of the wheat. The Chapter 7 trustee sought to avoid the transfer of the wheat as a preferential transfer under Section 547(b). The court agreed that the transfer was based on an antecedent debt and that the issue was whether an exception applied. Section 547(c)(1) provides that a transfer is not avoidable to the extent it was "(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange . . .." The trustee argued that the transfers were not contemporaneous because the wheat contract was entered into in May 2014, delivery did not occur until July and August and payment was made seven days after the second delivery. The court found that the debtor did receive new value for the delivered wheat and that the payment was substantially contemporaneous with the delivery of the wheat. Thus, the court held that the transfers met the exception of Section 547(c)(1). The court also discussed the exception provided by Section 547(c)(2) that a transfer was not avoidable "(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was— (A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or (B) made according to ordinary business terms . . .." The court found that the debtor and brokerage had some history of similar transactions and that the trustee failed to provide any evidence that the sale of the wheat was not consistent with the ordinary course of business between the debtor and the brokerage. The court held that, because the preferential transfer at issue here was a contemporaneous exchange for new value and made in the ordinary course of business, the trustee could not avoid the transfer of the wheat. **Rice v. Prairie Gold Farms, 2018 U.S. Dist. LEXIS 51678 (E.D. Ark. 2018)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION SKIPPING TRANSFERS. Prior to September 25, 1985, the decedent had created an irrevocable *inter vivos* trust for the decedent and a daughter. The trust provided for remainders to the decedent's grandchildren and great-grandchildren. The trust became irrevocable at the death of the decedent and was split into individual trusts for each remainder holder at the death of the daughter. In a prior letter ruling, the IRS ruled that the modification and split of the trust did not cause any recognition of gift or estate taxes. The current ruling involved one of the remainder trusts for which the current beneficiary obtained a court order modifying and splitting the trust into separate trusts for each of the beneficiary's children. The new trusts retained the provisions governing remainder interests created in the original pre-1985 trust and no additional property had been contributed to the trust since 1985. The IRS ruled that the partitioning of the remainder trust did not subject the trust or trusts to GSTT, did not cause recognition of any gain or loss, and did not cause any taxable gifts. **Ltr. Rul. 201818005, Jan. 16, 2018**.

POWER OF APPOINTMENT. Prior to September 25, 1985, the decedent had created an irrevocable *inter vivos* trust for the benefit of the decedent and the decedent's child. Under the trust agreement, after the death of the decedent and the child, the trust was split into two trusts, one for each grandchild. Each trust provided for three co-trustees, including the beneficiary of each trust. Each trust provided that while a beneficiary is also a co-trustee of a trust, such beneficiary co-trustee shall not have any right to participate in any manner which would shift any beneficial interest in the trust to or from such beneficiary co-trustee. The trust required the trustees to pay or apply for the benefit of the beneficiary, the beneficiary's children, and grandchildren, the net income and principal as the trustees may deem necessary for the reasonable support, care, education, and maintenance of the beneficiary, the beneficiary's children, and grandchildren. All such discretionary power shall be exercised solely by the other trustees. Under Fla. Stats. Ann. § 737.402(4)(a)(1), unless a settlor or a testator clearly indicates that a broader power is intended by express reference to the state law, a beneficiary of a trust that permits the beneficiary, as trustee or co-trustee, to make discretionary distributions of income or principal to or for the benefit of the beneficiary may exercise that power in the beneficiary's favor only to provide for the beneficiary's health, education, support, or maintenance within the meaning of I.R.C. §§ 2041 and 2514. The Florida law allows a trust to elect out of this provision but the trust in this case did not make the election. Treas. Reg. § 25.2514-1(b)(1) provides that the term "power of appointment" includes all powers that are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. If a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a donee to affect the beneficial enjoyment of trust property or its income by altering, amending or revoking the trust instrument or terminating the trust is a power of appointment. Further, a power in a donee to remove or discharge a trustee and appoint the donee trustee may be a power of appointment. Treas. Reg. § 25.2514-1(c)(2) provides that a power to consume, invade, or appropriate income or corpus, or both, for the benefit of the possessor of the power that is limited by an ascertainable standard relating to health, education, support or maintenance of the possessor is, by reason of I.R.C. § 2514(c)(1) not a general power of appointment. I.R.C. § 2041(b)(1)(A) provides that a general power of appointment is a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate; however, a power to consume, invade, or appropriate property for the benefit of the decedent that is limited to the health, education, support, or maintenance of the decedent is not deemed to be a general power of appointment. *Rev. Proc. 94-44, 1994-2 C.B. 683*, sets forth the IRS position regarding the transfer tax consequences of the enactment of Fla. Stat. Ann. § 737.402(4)(a)(1). Under this statute, any fiduciary power conferred upon a trustee to make discretionary distributions of either principal or income to or for the trustee's own benefit cannot be exercised by the trustee, except to provide for that trustee's health, education, maintenance, or support, as described in I.R.C. §§ 2041 and 2514. Pursuant to the revenue procedure, the IRS ruled that it will not treat the statute as causing the lapse of a general power of appointment for purposes of I.R.C. §§ 2041 and 2514, where the scope of a fiduciary power held by a beneficiary was restricted as a result of the statute. Thus, the IRS ruled that the beneficiary co-trustee would not have a general power of appointment with respect to the trust property. **Ltr. Rul. 201817002, Jan. 5, 2018; Ltr. Rul. 201817003, Jan. 5, 2018**.

FEDERAL FARM PROGRAMS

CROP INSURANCE. The plaintiff was a partnership which purchased federal crop insurance for 2013 from the defendant insurance company. Both the plaintiff and the defendant's agents believed that the plaintiff had purchased full coverage of all of the plaintiff's acres for 2013. However, when the plaintiff filed a crop loss claim for one parcel and a prevented planting claim for two other parcels, the defendant denied the claims because (1) the single parcel was listed as situated in the wrong county and (2) the other two parcels were not properly claimed on an FSA report. The defendant acknowledged that the lack of coverage in all three cases resulted from errors by the defendant's agents. The plaintiff sought arbitration and the arbitrator agreed with the plaintiff on the claims and awarded treble damages, attorneys' fees and litigation costs to the plaintiff. The arbitrator cited extra-contractual legal theories for the awards, including negligence, breach of fiduciary duty, constructive fraud and violation of the North Carolina Unfair and Deceptive Trade Practices Act. The defendant challenged the arbitration award as beyond the authority of the arbitrator. The court cited *Davis v. Producers Agric. Ins. Co., 762 F.3d 1276 (11th Cir. 2014)* for the rule that the statutes and regulations associated with the federal crop insurance scheme limit the arbitrator's authority such that an arbitrator cannot interpret the meaning, scope, or applicability of the insurance policy, but instead must obtain an interpretation of any ambiguous policy provision from the FCIC. Under 7 C.F.R. § 457.8 (Common Crop Insurance Policy § 20(a)(1)), " . . . if the dispute in any way involves a policy or procedure interpretation, regarding whether a specific policy provision or procedure is applicable to the situation, how it is applicable, or the meaning of any policy provision or procedure, either you or we must obtain an interpretation from FCIC in accordance with 7 C.F.R. part 400, subpart X or such other procedures as established by FCIC.

(i) Any interpretation by FCIC will be binding in any mediation or arbitration.

(ii) Failure to obtain any required interpretation from FCIC will result in the nullification of any agreement or award . . .." In addition, 7 U.S.C. § 1506(l) grants pre-emption of the remedies provided by the crop insurance over state or common law remedies unless the FCIS determines that the insurance provider, agent, or loss adjusters failed to follow FCIC approved policy or procedure. See also 7 C.F.R. § 400.176(b). In this case, the court found that the arbitrator had ruled that the three parcels were uninsured by the policies issued but that damages were awarded under extra-policy legal theories of negligence, breach of fiduciary duty and constructive fraud. The trebling of the award for damages was based on violations of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. G. Stat. § 75-16.1. The court found that the arbitrator had not sought a ruling from the FCIC that the defendant or the defendant's agents had failed to follow FCIC policy or procedure. Therefore, the court held that the arbitrator's awards were beyond the power of the arbitrator to grant and vacated the awards. **Williamson Farm v. Diversified Crop Ins. Services, 2018 U.S. Dist. LEXIS (E.D. N.C. 2018)**.

ORGANIC FOOD. The AMS has issued proposed regulations which would amend the National List of Allowed and Prohibited Substances section of the USDA's organic regulations to implement recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board. The proposed rule adds elemental sulfur to the National List for use in organic livestock production, reclassifies potassium acid tartrate from a non-agricultural substance to an agricultural substance, and requires the organic form of potassium acid tartrate when commercially available. **83 Fed. Reg. 18744 (April 30, 2018)**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. *Rev. Proc. 2015-13, 2015-1 C.B. 419, as clarified and modified by Rev. Proc. 2015-33, 2015-1 C.B. 1067, and as modified by Rev. Proc. 2017-59, 2017-2 C.B. 543, and by Rev. Proc. 2016-1, 2016-1 C.B. 1,* revised the general procedures under I.R.C. § 446(e) and Treas. Reg. §1.446-1(e) for taxpayers to obtain advance and automatic consent to change a method of accounting for federal income tax purposes. Generally, *Rev. Proc. 2015-13* is effective for Forms 3115 filed on or after January 16, 2015, for a year of change ending on or after May 31, 2014. The IRS has issued a revenue procedure modifying *Rev. Proc. 2015-13* as modified, including the following changes: (1) The temporary waiver of the eligibility rule in section 5.01(1)(f) of *Rev. Proc. 2015-13*, is removed because it is obsolete. (2) The revocation of the partial disposition election under the remodel-refresh safe harbor is obsolete and is removed from the revenue procedure in its entirety. (3) A change to the remodel-refresh safe harbor is modified to remove paragraph (2), relating to the temporary waiver of the eligibility rules in sections 5.01(1)(d) and (f) of Rev. Proc. 2015-13, because they are obsolete; (4) the uniform capitalization (UNICAP) methods used by resellers and reseller-producers is modified to provide that a small reseller is not permitted to make a change in method of accounting for any tax year beginning after December 31, 2017; the changing to overall cash receipts and disbursements (cash) method and the small taxpayer exception from requirement to account for inventories under I.R.C. § 471, are modified to provide that these changes do not apply for any taxable year beginning after December 31, 2017; (5) the provision for nonshareholder contributions to capital is modified to provide that the change does not apply to contributions made after December 22, 2017; (6) the changes for advance payments are modified to provide that the eligibility rule does not apply to a taxpayer that changes to a method of accounting for the taxpayer's first or second tax year ending on or after May 9, 2018; (7) the provision governing sales-based vendor chargebacks is modified to remove the temporary waiver of the eligibility rule in section 5.01(1)(f) of Rev. Proc. 2015-13, because it is obsolete; and (8) the provision relating to a taxpayer changing its method of accounting for securities or commodities from the mark-to-market method of accounting described in I.R.C. § 475 to a realization method of accounting, is modified to provide that the waiver of the eligibility rule in section 5.01(1)(f) of *Rev. Proc. 2015-13* no longer applies to this change. The waiver of the eligibility rule in section 5.01(1)(d) of *Rev. Proc. 2015-13* continues to apply to this change. Subject to a transition rule, this revenue procedure is effective for a Form 3115 filed on or after May 9, 2018, for a year of change ending on or after September 30, 2017, that is filed under the automatic change procedures. **Rev. Proc. 2018-31, I.R.B. 2018-22**.

DISCHARGE OF INDEBTEDNESS. The taxpayers, husband and wife, obtained loans to finance the college education of one of their children. After the husband became disabled, the husband sought to have the loans discharged because the husband became disabled and could not work. The loan proceeds were initially transferred to a savings account in the child's name but the wife had access to the account and transferred funds to the taxpayers' joint account. The loans were discharged in 2011. On the taxpayers' tax return for 2011, the taxpayers did not include the amount of the discharged loans in taxable income. The taxpayers filed Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment)*, which claimed that the taxpayers' liabilities exceeded their assets, entitling them to reduce tax attributes instead of including the discharged amount as taxable income. The parties agreed that, if the funds in the child's savings account are not included in the taxpayers' assets, the taxpayer were insolvent. The IRS argued that the child held the savings account as a nominee for the taxpayers; therefore, the amount in the account should be included in the taxpayers' assets. The court first looked at state law to determine ownership of the account. The court held that, under Utah case law precedent six factors were used to determine whether property is held in nominee status: "(1) the taxpayer exercises dominion and control over the property while the property is in the nominee's name; (2) the nominee paid little or no consideration for the property; (3) the taxpayer placed the property in the nominee's name in anticipation of a liability or lawsuit; (4) a close relationship exists between the taxpayer and the nominee; (5) the taxpayer continues to enjoy the benefits of the property while it is in the nominee's name; and (6) the conveyance to the nominee is not recorded. The court held that the child held the savings account as a nominee for the taxpayers because (1) the wife was able to freely transfer funds to petitioners' joint account to pay household bills (i.e., she exercised dominion and control) (2) there is no evidence that the child paid any consideration for the funds transferred to the savings account, or that the funds were transferred in anticipation of a lawsuit or a liability, and (3) there was sufficient evidence to establish that a close relationship existed between petitioners and their child, and that petitioners continued to enjoy the benefits of the funds they transferred to the child's savings account. **Hamilton v. Comm'r, T.C. Memo. 2018-62**.

DISASTER LOSSES. On April 17, 2018, the President determined that certain areas in West Virginia were eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe storms, flooding, landslides and mudslides which began on February 14, 2018. **FEMA-4359-DR.** On April 17, 2018, the President determined that certain areas in Ohio were eligible for assistance from the government under the Act as a result of severe storms, flooding, and landslides which began on February 14, 2018. **FEMA-4360-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).

HEALTH INSURANCE. The IRS has published information about the Small Business Health Care Tax Credit, which can benefit certain small employers who provide health coverage to employees. Also, the IRS noted that it recently issued guidance that provides relief for certain small employers wishing to claim the Small Business Health Care Tax Credit for 2017 and later years but who are unable to do so because of unavailability of coverage in the Small Business Health Options Marketplace. *Notice 2018-27, I.R.B. 2018-20* (summarized at 29 *Agric. L. Digest* 68 (2018) gives guidance about calculating the credit under these circumstances. Generally, to qualify for the credit, small employers must provide employees a qualified health plan from a SHOP Marketplace. Also, small employers may only claim the credit for two consecutive tax years. The recently provided relief helps employers who first claim the credit for all or part of 2016 or a later tax year for coverage offered through a SHOP Marketplace, but who cannot offer SHOP Marketplace coverage to employees for all or part of the remainder of the credit period because there are no SHOP Marketplace plans available where the employer is located. Under the relief, the employer can claim the credit for health insurance coverage provided outside of a SHOP Marketplace for the remainder of the credit period if that coverage would have qualified under the rules that applied before January 1, 2014. **IRS Tax Tip 2018-71**.

HEALTH SAVINGS ACCOUNTS. For tax years beginning after December 31, 2014, the maximum annual HSA is the indexed statutory amount, without reference to the deductible of the high deductible health plan. For calendar year 2019, the limitation on deductions under I.R.C. § 223(b)(2)(A) for an individual with self-only coverage under a high deductible health plan is $3,500 ($7,000 for family coverage). For calendar year 2019, a "high deductible health plan" is defined under I.R.C. § 223(c)(2)(A) as a health plan with an annual deductible that is not less than $1,350 for self-only coverage or $2,700 for family coverage, and the annual out-of-pocket expenses (deductibles, co-payments, and other amounts, but not premiums) do not exceed $6,750 for self-only coverage or $13,500 for family coverage. **Rev. Proc. 2018-30, I.R.B. 2018-21**.

HOBBY LOSSES. The taxpayer was president of a group of real estate development companies. The taxpayer's income came primarily from trusts which owned the real estate companies. The taxpayer worked an average of 10 hours per week for the companies. The taxpayer owned a horse operation involved in the breeding, training, showing and selling of quarter horses. The court held that the horse operation was not operated with the intent to make a profit because (1) although the taxpayer presented a business plan for the operation, the plan was prepared only after the taxpayer was audited and the taxpayer presented no evidence that the plan was ever used; (2) although the taxpayer demonstrated sufficient expertise in the breeding, training and showing of horses, the taxpayer did not have any expertise in the business of horses and did not engage any experts as to the profitable business of horses; (3) the taxpayer spent considerable time on the horse operation but most of that time was for personal enjoyment and recreation; (4) the taxpayer did not present information of sufficient appreciation of the value of the operation's assets to offset substantial annual losses; (5) the annual losses substantially exceeded the occasional profits; and (6) the losses offset substantial income from other sources. The appellate court affirmed in a decision designated as not for publication. **Hylton v. Comm'r, 2018-1 U.S. Tax Cas. (CCH) ¶ 50,237 (4th Cir. 2018),** ***aff'g*****, T.C. Memo. 2016-234**.

MARRIAGE. A state board of finance and revenue concluded that the decedent and surviving partner had entered into a common-law marriage under state law and that "based on the specific facts and circumstances presented, the decedent and surviving partner were common-law spouses" when the decedent died. Treas. Reg. § 301.7701-18(b)(1) provides that a marriage of two individuals is recognized for federal tax purposes if the marriage is recognized by the state, possession, or territory of the United States in which the marriage is entered into, regardless of domicile. In this case, the IRS ruled that, because the state board of finance and revenue held that the decedent and surviving partner were married under state law when the decedent died, their marriage is recognized for federal tax purposes. **TAM 201734007, May 1, 2017**.

PARTNERSHIPS

ELECTION TO ADJUST BASIS. The taxpayer was formed as a limited liability company and was treated as a partnership for federal tax purposes. The taxpayer underwent a technical termination under I.R.C. § 708(b)(1)(B) during the tax year and The taxpayer intended to make an election under I.R.C. § 754 in connection with the transfer of interests that led to the technical termination. However, the taxpayer inadvertently failed to file a timely I.R.C. § 754 election with the return for its taxable year. The taxpayer represented that it relied on its tax advisor for tax advice for filing the return and election. The IRS granted an extension of time for the taxpayer to file the election under I.R.C. § 754. **Ltr. Rul. 201818003, Jan. 30, 2018**.

PENSION PLANS. For plans beginning in May 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 3.07 percent. The 30-year Treasury weighted average is 2.85 percent, and the 90 percent to 105 percent permissible range is 2.56 percent to 2.99 percent. The 24-month average corporate bond segment rates for May 2018, *without adjustment* by the 25-year average segment rates are: 2.00 percent for the first segment; 3.68 percent for the second segment; and 4.44 percent for the third segment. The 24-month average corporate bond segment rates for May 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 2018-53, I.R.B. 2018-22**.

TAX RETURN PREPARERS. The IRS has reminded tax return preparers who submit two or more paper returns claiming any of three refundable tax credits without attaching Form 8867, *Paid Preparer's Due Diligence Checklist*, will receive follow-up letters from the IRS. Preparers who are paid to complete returns claiming the earned income tax credit (EITC), the Child Tax Credit, the additional child tax credit (CTC/ACTC) and the American Opportunity Tax Credit (AOTC) must meet due diligence requirements. I.R.C. § 6695 and Treas. Reg. § 1. 6695-2 set out the refundable credit due diligence requirements and the penalties for failure to comply with them. (1) Complete and submit the Form 8867 as directed for all paper and electronic tax returns and all other claims for the EITC, the CTC/ACTC or the AOTC. (2) Complete all the necessary worksheets or similar documents showing how each of the credits was calculated. (3) Learn about the tax law to determine the taxpayer's eligibility for, and the amount of, the credits. In evaluating information provided by the taxpayer, the tax preparer is held to a standard of making reasonable inquiries, if a reasonable and well-informed tax preparer, knowledgeable in the law, would conclude that the information seems incorrect, inconsistent, or incomplete. Preparers should be sure to note the questions asked and the answers your client gave at the time of the interview. (4) Keep a copy of all of the above, along with a record of how and when the information was obtained to determine eligibility for, and the amount of, the credits. Preparers must also keep a copy of all the documents reviewed and used to determine eligibility for and the amount of the credits. The IRS web site has additional programs and resources for preparers: (1) Due Diligence Training Module. This training module, available in both English and Spanish, is interactive training to help learn the due diligence requirements when preparing returns claiming the EITC, the CTC and the AOTC. There is no cost and may qualify for one IRS continuing education credit. (2) Due Diligence Videos. The due diligence videos from the IRS Nationwide Tax Forums gives examples of interview techniques for those prickly due diligence situations. (3) Useful examples on how to handle common due diligence situations. (4) Information and examples on handling the most common refundable credit errors. (5) Forms 886 (requests for supporting documents) can be used to help preparers and their clients understand what documents the IRS may need to prove their claim for the EITC, the CTC or the AOTC. (6) IRS Publication 4687, *Refundable Credit Due Diligence*, available in both English and Spanish, provides guidance to help with due diligence requirements. **https://www.eitc.irs.gov/tax-preparer-toolkit/preparer-due-diligence/preparer-due-diligence**

PRODUCTS LIABILITY

ANIMAL FEED. The plaintiff purchase dairy cow feed from the defendant. On April 17, 2013, the plaintiff started to feed its dairy cows from the first "green chop" of the season harvested from the plaintiff's fields. On April 18, 2013, the plaintiff started feeding grain purchased from the defendant and delivered on that day. The plaintiff's "dry" cows and bulls did not eat any of the grain but fed on only the green chop. Most of the young calves ate both the green chop and the grain but did not get sick. The next day after the grain was fed, several of the milking cows became sick and the plaintiff's veterinarian diagnosed these cows with salmonella poisoning, most probably from the grain. However, the veterinarian tested three samples of the grain and did not find any salmonella contamination. The veterinarian did not test the green chop for salmonella. The plaintiff sued for damages resulting from the loss of cows and productivity from contaminated feed. At trial, the defendant moved for summary judgment because the plaintiff had failed to provide any evidence specifically identifying any contamination of the feed. The plaintiff argued that the expert testimony of the veterinarian that there was an 80 percent chance that the grain was the source of the contamination raised a sufficient issue of fact to deny the summary judgment. The trial court agreed and dismissed the case. On appeal the appellate court affirmed, noting that none of the evidence specifically identified the grain as a source of salmonella contamination, noting that the plaintiff failed to find salmonella anywhere but in the affected cows, leaving no evidence that the defendant's grain was the cause of the injury to the plaintiff's cows. **White River Feed Co. v. Kruse Family, L.P., 2018 Wash. App. LEXIS 1031 (Wash. Ct. App. 2018)**.

WORKERS' COMPENSATION

EMPLOYER. The plaintiff was employed as a worker for a defendant limited liability company (LLC-1) on a horse farm owned by another LLC (LLC-2). Both LLCs were owned by the same individual. The plaintiff was injured while working for LLC-1 on the horse farm. The issue was whether the LCC-2 was considered the alter ego of LLC-1. The court stated that a defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity. Factors relevant to the determination of that issue include whether the two entities share a common purpose, have integrated or commingled assets, share a tax return, are treated by the owners as a single entity, share the same insurance policy, and share managers or are owned by the same person. Additional factors include whether the alter ego has any employees, whether the alter ego leases property pursuant to a written lease or pays rent to the plaintiff's employer, and whether one entity pays the bills for the other even if those bills are for the benefit of the nonpaying entity. The court held that the LLC-2 was the alter ego of LLC-1 as the plainitff's employer because (1) the LLCs were created on the same day by the single owner for the single purpose of owning and operating a horse farm; both LLCs used the same return to file taxes; both LLCs shared the same insurance policy; LLC-2 had no employees and was formed solely to own and lease farm land to LLC-1; there was no written lease and LCC-1 did not pay rent to LLC-2; and the owner of both LLCs paid the property taxes and all business expenses. **Buchwald v. 1307 Porterville Rd., LLC, 2018 N.Y. App. Div. LEXIS 2906 (N.Y. Ct. App. 2018)**.