wages under this method are calculated as follows—

(1) total the amounts in Box 1 of all Forms W-2 filed with SSA by the taxpayer with respect to employees of the taxpayer for employment by the taxpayer.

(2) subtract from the total in (1) amounts included in Box 1 of Forms W-2 that are not wages for federal income tax withholding purposes, including amounts that are treated as wages for purposes of income tax withholding under I.R.C. § 3402(o); and

(3) add to the amount obtained in (2) the total of the amounts that are reported in Box 12 of Forms W-2 with respect to employees of the taxpayer for employment by the taxpayer and that are properly coded D, E, F, G, and S.

Tracking wages method. Under the tracking wages method, the taxpayer actually tracks total wages subject to federal income tax withholding and makes appropriate modifications. W-2 wages under this method are calculated as follows—Total the amounts of wages subject to federal income tax withholding that are paid to employees of the taxpayer for employment by the taxpayer and that are reported on Forms W-2 filed with SSA by the taxpayer for the calendar year; plus the total of the amounts that are reported in Box 12 of Forms W-2 with respect to employees of the taxpayer for employment by the taxpayer and that are properly coded D, E, F, G, and S.

The revenue procedure also provides a method for calculating W-2 wages for taxpayers with short taxable years.

ENDNOTES

[1] REG-107892-18, 83 Fed. Reg. 40884 (Aug. 16, 2018). See Achenbach, "Qualified Business Income – New Proposed Regulations, Part I," 29 *Agric. L. Dig*. 121 (2018); See Achenbach, "Qualified Business Income – New Proposed Regulations, Part II," 29 *Agric. L. Dig*. 129 (2018); See Achenbach, "Qualified Business Income – New Proposed Regulations, Part III," 29 *Agric. L. Dig*. 137 (2018).

[2] Pub. L. No. 115-97, § 11011, 131 Stat. 2066 (2017), *adding* I.R.C. § 199A(d).

[3] Treas. Reg. § 1.199A-1(b)(13).

[4] Note that, if the landlord's participation rises to the level of "material participation," the rent in most cases is not only trade and business income but self-employment income, reported on Schedule SE. See Harl, *Farm Income Tax Manual*, § 8.05[3] (2018) for discussion of leasing of farm property as a trade or business for self-employment purposes.

[5] Prop. Treas. Reg. § 1.199A-1(b)(13); Prop. Treas. Reg. § 1.199A-4(b)(1)(i).

[6] Treas. Reg. § 1.199A-4(b).

[7] 1991-1 C.B. 61

[8] See definition in Treas. Reg. § 1.1221-2(b).

[9] REG-134652-18, 84 Fed. Reg. __ (2019).

[10] Notice 2019-7, I.R.B. 2019-__, __.

[11] Real estate used by the taxpayer (including an owner or beneficiary of a relevant passthrough entity relying on this safe harbor) as a residence for any part of the year under I.R.C. § 280A is not eligible for this safe harbor. Real estate rented or leased under a triple net lease is also not eligible for this safe harbor.

[12] For taxable years beginning after December 31, 2022, in any three of the five consecutive taxable years that end with the taxable year. 250 or more hours of rental services are performed per year with respect to the rental real estate enterprise. For an enterprise held for less than five years, the 250 hours must be performed each year.

[13] The statement must be signed by the taxpayer, or an authorized representative of an eligible taxpayer or relevant passthrough entity, which states: "Under penalties of perjury, I (we) declare that I (we) have examined the statement, and, to the best of my (our) knowledge and belief, the statement contains all the relevant facts relating to the revenue procedure, and such facts are true, correct, and complete."

[14] Rev. Proc. 2019-11, I.R.B. 2019-__.

[15] See I.R.C. § 402(g)(3)

[16] Treas. Reg. § 1.199A-1(b)(15). Deferred compensation includes compensation deferred under I.R.C. § 457, and the amount of any designated Roth contributions, as defined in I.R.C. § 402A.

[17] See Treas. Reg. § 1.199A-2(b)(2)(iii).

[18] Treas. Reg. § 1.199A-2(b)(2).

[19] Treas. Reg. § 1.199A-2(b)(3) (the portion of the W-2 wages allocable to each trade or business is determined in the same manner as the expenses associated with those wages are allocated among the trades or businesses).

[20] Treas. Reg. § 1.199A-2(b)(4) (W-2 wages are properly allocable to QBI if the associated wage expense is taken into account in computing QBI under Treas. Reg. § 1.199A-3.).

[21] Rev. Proc. 2019-11, I.R.B. 2019-__.

CASES, REGULATIONS AND STATUTES

BANKRUPTCY

CHAPTER 12

PLAN. The debtors were a limited liability company and a limited partnership, both owned by two brothers. The debtors filed an amended plan which provided for periodic payments to the secured creditors funded primarily by the debtors' farming income and supplemented by custom trucking and combining revenue. Although the creditors objected to several aspects of the plan, including interest rates, terms of payment and retention of liens, the main issue was whether the plan was feasible under Section 1225(a)(6). The court stated that the test under Section 1225 was that a chapter 12 plan is considered feasible if the court finds a reasonable assurance of success, which is established when the plan offers a realistic and workable framework for reorganization. The court found that the debtors had presented sufficient, if somewhat tenuous, evidence that they could reasonably make the plan payments in the first year. However, the court held that the plan was not confirmable because, after the first year, (1) the debtors' projection of revenue in the later years was overstated and expenses were understated, based on the historical experience of the debtors. In particular, the court noted that the projection of crop yields and crop prices did not match the harvests and prices of recent years which had been declining. The court also found that the debtors failed to provide sufficient evidence to support their projections of revenues and expenses. Thus, the court held that the plan was not confirmable under Section 1225(a)(6) for lack of feasibility. ***In re* Jubilee Farms, 2018 Bankr. LEXIS 4080 (Bankr. E.D. Ky. 2018)**.

FEDERAL TAX

JURISDICTION. The debtor was an limited liability company taxed as an S corporation and filed for Chapter 7. The debtor was scheduled to receive a distribution from a litigation settlement and the debtor's two shareholders claimed that they would be liable for federal taxes on the distribution. The shareholders argued that the distribution should be taxable only to the corporation and sought a court ruling under Section 505 that they were not liable for the taxes on the distribution. Section 505 gives a bankruptcy court the authority to determine the amount or legality of a fine or penalty relating to a tax. The United States objected, arguing that the court lacked jurisdiction over the issue because it involved only the tax liability of non-debtors in the case. Under *United States v. Huckabee Auto Co., 783 F.2d 1546 (11th Cir. 1986)*, the court held that a Bankruptcy Court lacks jurisdiction to determine the tax liability of a non-debtor, even where the non-debtor is a officer or shareholder of a debtor entity in bankruptcy. The Bankruptcy Court in this case found that any distribution received by the debtor S corporation would pass-through to the shareholders and be the sole liability of those shareholders. In addition, the court noted that the purpose of Section 505 was to give the bankruptcy courts the power to make final determinations as to the debtor's tax liability so as to facilitate final distributions to the creditors. In this case, the tax liability would be solely that of the shareholders and would have no effect on the debtor corporation's distributions to creditors. Thus, the court held that it had no jurisdiction over the tax liability of the shareholders and dismissed their action. ***In re* AWA Fabrication and Construction, LLC v. United States, 2019-1 U.S. Tax Cas. (CCH) ¶ 50,126 (Bankr. M.D. Ala. 2019)**.

FEDERAL ESTATE AND GIFT TAXATION

ESTATE TAX LIEN. The decedent created an irrevocable trust in 1998 for the decedent's son. The decedent executed a deed to transfer the decedent's residence to the trust but the deed included a signature of only one witness instead of two as required by Florida law. After the death of the decedent in 2005, the estate was issued a deficiency for unpaid federal estate taxes based on inclusion of the residence in the decedent's estate. The IRS attempted to sell the property to satisfy an estate tax lien but the son filed a quiet title action to prevent the transfer. At issue in the case was the effect of Fla. Stat. § 95.231 which provides ". . . [f]ive years after the recording of an instrument required to be executed in accordance with § 689.01 … from which it appears that the person owning the property attempted to convey [the property], … the instrument … shall be held to have its purported effect to convey [the property] … as if there had been no lack of … witness or witnesses … in the absence of fraud, adverse possession, or pending litigation." The son argued that the statute cured the witness signature defect as of 2003, prior to the creation of the decedent's estate and prevented the property from being included in the estate. The IRS argued that, although the statute did provide for curing the defect, the statute was in the nature of a statute of limitations and the holding of *United States v. Summerlin, 310 U.S. 414 (1940)* prohibited a statute of limitations from affecting the federal rights to the property. The IRS interpreted the statute to require a judicial holding before the title passes under the statute, based on the "shall be held" language. The District Court held in favor of the IRS interpretation and ruled that the statute could not be used to deny the estate tax lien. The appellate court looked to rulings by the Florida courts involving the state and held that the Florida court interpreted the statute to be self-executing such that, after five years, the deed to the trust became perfected as to any witness signature defect. The court agreed that *Summerlin* held that a state statute of limitation could not remove any federal right in property once the federal government had acquired a right in or to the property; however, in this case, the statute removed the residence from the decedent's estate before the federal estate tax arose and before the estate tax lien attached. Therefore, appellate court held that the Florida statute did not operated to remove the federal rights in the property after the federal rights arose and was not barred by the *Summerlin* holding. Thus, the appellate court held that the residence was not part of the decedent's estate and was not subject to the federal estate tax lien. **Saccullo v. United States, 2019-1 U.S. Tax Cas. (CCH) ¶ 60,708 (11th Cir. 2019)**.

FEDERAL FARM PROGRAMS

No Items.

FEDERAL INCOME TAXATION

EMPLOYMENT TAXES. The taxpayer was a medical doctor who founded a medical services practice in 1979. In May 2009, the taxpayer discovered that the chief financial officer had failed to pay the employee withholding taxes and had embezzled the funds instead. The company was terminated and all assets transferred to the IRS in partial payment of over $10 million in unpaid withholding taxes. The taxpayer made a personal loan to the company solely to pay the May 2009 employee wages but not the withholding taxes and the company terminated. The taxpayer agreed that the taxpayer was a "responsible person" under I.R.C. § 6672 but argued that the taxpayer did not willfully fail to collect, account for, or pay the taxes owed. An employer's responsible persons, such as officers and managers, can be held personally liable under I.R.C. § 6672 for "trust fund recovery penalties" if the trust fund taxes are not paid when due. Liability under I.R.C. § 6672 requires that (1) the individual was a responsible person within the business, i.e., someone required to collect, truthfully account for, or pay over the trust fund taxes; and (2) the individual willfully failed to do so. The court found that, because the company had borrowed funds from the taxpayer and the taxpayer, as a responsible person, failed to pay those company funds to the IRS, the taxpayer acted willfully in failing to pay the employment taxes. The taxpayer also argued that the loaned funds were encumbered by the restriction that the funds were to be used solely for payment of wages; therefore, the taxpayer did not act willfully in failing to use the restricted loan funds for taxes. The trial court found that the loaned funds were not sufficiently encumbered because (1) the taxpayer voluntarily placed the restriction on the funds and (2) the company was not legally required to pay the loaned funds as wages. Although the court sympathized with the taxpayer's generous attempt to support the employees, the taxpayer still made a conscious decision to pay the employees before the IRS and that decision subjected the taxpayer to the I.R.C. § 6672 penalty. On appeal, the District Court decision was partially vacated and remanded for findings as to whether the company had any unencumbered funds with which to pay the employment taxes once the taxpayer learned about the unpaid taxes. On remand, the District Court again held that the taxpayer was a responsible person, had available funds to pay the taxes, and willfully paid other creditors instead of the IRS. **McClendon v. United States, 2019-1 U.S. Tax Cas. (CCH) ¶ 50,135 (S.D. Tex. 2019),** ***on rem. from*** **2018-1 U.S. Tax Cas. (CCH) ¶ 50,283 (5th Cir. 2018),** ***vacating in part and remanding*** **2016-2 U.S. Tax Cas. (CCH) ¶ 50,480 (S.D. Tex. 2016).**

ESTIMATED TAXES. The IRS has issued a Notice which provides a waiver of the addition to tax under I.R.C. § 6654 for the underpayment of estimated income tax for certain individuals who would otherwise be required to make tax year 2018 estimated income tax payments on or before January 15, 2019. The waiver is limited to individuals whose total withholding and estimated tax payments equal or exceed 85 percent of the tax shown on the return for the 2018 taxable year. I.R.C. § 6654 provides that, in the case of an individual, estimated income tax is required to be paid in four installments and the amount of any required installment is 25 percent of the required annual payment. Generally, under I.R.C. § 6654(d)(1)(B), the required annual payment is the lesser of (1) 90 percent of the tax shown on the return for the taxable year or (2) 100 percent of the tax shown on the taxpayer's return for the preceding taxable year (110 percent if the individual's adjusted gross income on the previous year's return exceeded $150,000), so long as the preceding taxable year was a full 12 months long. However, an individual may not use the tax for the preceding taxable year to calculate the required estimated tax payments if that taxable year was not 12 months long, or the individual did not file a return for that preceding taxable year. Under I.R.C. § 6654(d)(2), the amount of the required installment is the annualized income installment for those taxpayers who establish that such amount is lower than 25 percent of the required annual payment determined under I.R.C. § 6654(d)(1). Pursuant to I.R.C. § 6654(g), income taxes withheld from wages are deemed to be paid evenly throughout the tax year, unless the taxpayer establishes the dates on which the amounts were actually withheld. I.R.C. § 6654(a) imposes an addition to tax for failure to make a sufficient and timely payment of estimated income tax. Under I.R.C. § 6654(e)(1), an addition to tax will not be imposed on an individual taxpayer if the taxpayer owes less than $1,000 in tax, after subtracting tax withheld on wages. Under I.R.C. § 6654(e)(2), an individual will not be subject to an addition to tax if the individual did not have any tax liability for the previous year, the preceding taxable year was 12 months, and the individual was a citizen or resident of the United States throughout the preceding tax year. The Secretary is authorized by I.R.C. § 6654(e)(3)(A) to waive the addition to tax if he "determines that by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." To request the waiver, an individual must file Form 2210, *Underpayment of Estimated Tax by Individuals, Estates, and Trusts*, with the 2018 income tax return filed electronically or on paper. Taxpayers should complete Part I of Form 2210 and the worksheet included in the form instructions to determine if the waiver in this notice applies. If the waiver applies, check Part II, Box A and include the statement "85% Waiver" with the return. Forms, instructions, and other tax assistance are available on IRS.gov. The waiver is in addition to any other exception that section 6654 provides to the underpayment of estimated income tax. **Notice 2019-11, I.R.B. 2019-__, __**.

EXPIRING TAX PROVISIONS. The Congressional Joint Committee on Taxation has published online its annual list of tax provisions set to expire in 2017 through 2027. Some of the notable provisions include—

(1) Expiring December 31, 2017: exclusion from gross income of discharge of indebtedness on principal residence (I.R.C. § 108(a)(1)(E)); treatment of premiums for certain qualified mortgage insurance as qualified residence interest (I.R.C. § 163(h)(3)(E)(iv)); the three-year recovery period for race horses two years old or younger (I.R.C. § 168(e)(3)(A)); accelerated depreciation for business property on an Indian reservation (I.R.C. § 168(j)(9)); deduction for qualified tuition and related expenses

(I.R.C. § 222(e)).

(2) expiring December 31, 2018: medical expense deduction: adjusted gross income floor of 7.5 percent (I.R.C. § 213(f)).

(3) expiring December 31, 2019: credit for health insurance costs of eligible individuals (I.R.C. § 35(b)(1)(B)); employer credit for paid family and medical leave (I.R.C. § 45S(i)); work opportunity credit (I.R.C. § 51(c)(4)); provisions modifying the rates of taxation of beer, wine, and distilled spirits, and certain other rules (I.R.C. §§ 263A(f)(4), 5001, 5041, 5051, 5212, and 5414). **https://www.jct.gov/publications.html?func=startdown&id=5157**

INNOCENT SPOUSE RELIEF. The taxpayer and former spouse filed their 2005 through 2010 joint returns late and did not pay the taxes due on the 2005 through 2009 returns. The taxpayer filed for divorce in 2011 and a divorce was granted in 2012. Both spouses had income from separate Schedule C businesses which gave rise to the tax liabilities for 2005 through 2010. The taxpayer filed for innocent spouse relief from the underpayment of taxes and was granted relief only as to the taxes attributable to the former spouse's income. The taxpayer appealed, seeking relief from the taxes attributable to the taxpayer's income as well. Under I.R.C. § 6015(b) and (c), relief is available only from an understatement of tax, that is, a proposed or assessed deficiency. I.R.C. § 6015(b) and (c) does not authorize relief from an underpayment of tax reported on a joint return; thus the court held that the taxpayer was not entitled to relief under those sections because the taxpayer was seeking relief as to underpaid taxes. I.R.C. § 6015(f) provides a requesting spouse may be relieved of joint liability if, taking into account all the facts and circumstances, it would be inequitable to hold the requesting spouse liable for any unpaid tax or deficiency or any portion thereof. *Rev. Proc. 2013-34, I.R.B. 2013-43, 397*, provides a non-exhaustive list of seven factors that are considered when determining whether to grant equitable relief: (1) marital status; (2) economic hardship if relief is not granted; (3) in the case of an underpayment, knowledge or reason to know the tax liability would not be paid; (4) legal obligation to pay the outstanding tax liability; (5) significant benefit derived from the unpaid tax liability; (6) compliance with the income tax laws; and (7) mental or physical health. The court found that the first six conditions were met by the taxpayer. Although the taxpayer did not meet the seventh condition as to the taxes attributable to the taxpayer's income, equitable relief may still if any of the following exceptions applies: (1) attribution due solely to the operation of community property law; (2) nominal ownership; (3) misappropriation of funds; (4) abuse; or (5) fraud committed by the nonrequesting spouse. The taxpayer attempted to present evidence of abuse by the former spouse because of the spouse's use of drugs and alcohol, gambling, sexual affairs and mismanagement of money. However, the court found that the taxpayer failed to provide sufficient evidence of the abuse of the taxpayer sufficient to prevent the taxpayer from questioning the tax returns or payment of the taxes. Thus, the court held that the taxpayer was not entitled to equitable innocent spouse relief as to the taxes attributable to the taxpayer's income. **Heydon-Grauss v. Comm'r, T.C. Memo. 2018-209**.

TAX COURT. The IRS has published some information for taxpayers who have pending Tax Court cases during the government shutdown. "*What should I do if a document I mailed or sent to the Tax Court was returned to me?* The Tax Court website indicates that mail sent to the court through the U.S. Postal Service or through designated private delivery services may have been returned undelivered. If a document you sent to the Tax Court was returned to you, as the Tax Court website indicates, re-mail or re-send the document to the Court with a copy of the envelope or container (with the postmark or proof of mailing date) in which it was first mailed or sent. In addition, please retain the original. *During the shutdown, does interest continue to accrue on the tax that I am disputing in my pending Tax Court case?* Yes. To avoid additional interest on the tax that you are disputing in your pending Tax Court case, you can stop the running of interest by making a payment to the IRS. Go to www.irs.gov/payments for payment options available to you. The IRS is continuing to process payments during the shutdown. *What should I do if I received a bill for the tax liability that is the subject of my Tax Court case?* If you receive a collection notice for the tax that is in dispute in your Tax Court case, it may be because the IRS has not received your petition and has made a premature assessment. When the government reopens, the IRS attorney assigned to your case will determine if a premature assessment was made and request that the IRS abate the premature assessment." **IRS Newswire, Jan. 25, 2019**.

INSURANCE

COVERAGE. The plaintiff and defendant were insurance companies whose insureds were involved in a lawsuit concerning an accident on a highway. The plaintiff claimed that the defendant was liable for the insurance proceeds paid to the injured party because the defendant's insurance policy covered the accident. The plaintiff's insured was injured when the insured's car was struck by another car after the insured stopped because of cattle on the highway. The owner of the cattle was raising the cattle on a farm owned by the defendant's insured, the owner's father. The farm owner claimed that the cattle owner was covered by the farm owner's liability policy with the defendant insurance company. The policy definition of "insured" included "persons in the course of performing domestic duties that relate to the 'insured premises.'" The defendant insurance company argued that the raising of cattle on the farm was not a "domestic duty" because the cattle operation did not involve the residence. The court found that the defendant's policy did not further define "domestic duty," and looked at prior case law for guidance. That case, *Marnholtz v. Church Mut. Ins. Co., 815 N.W.2d 708 (Wis. Ct. App. 2012),* used the dictionary definitions of "domestic:" "relating to the household or the family: concerned with or employed in the management of a household or private place of residence" or "connected with the supply, service, and activities of households and private residences." The court found that the cattle owner's activities on the father's farm were not "employed in the management of a household or private place of residence" because the cattle operation did not include the residence. Thus, the court held that the defendant's insurance policy did not cover the activities of the cattle owner and was not liable for the damages caused by the escaped cattle on the highway. **West Bend Mut. Ins. Co. v. Calument Equity Mut. Ins. Co., 2019 Wisc. App. LEXIS 24 (Wis. Ct. App. 2019)**.

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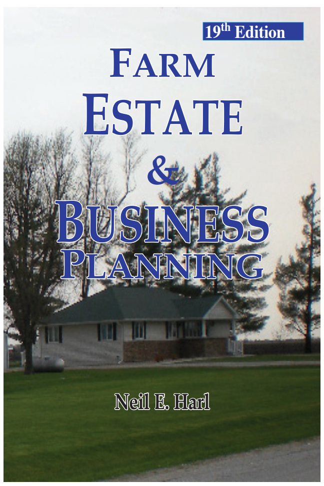

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