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Issue Contents

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Health Insurance Bills Are Now Law

-by Neil E. Harl*

With the President's signature to the Health Care and Education Reconciliation Act of 2010[1] on March 30, 2010 following the approval of the Patient Protection and Affordable Care Act[2] on March 23, 2010, the task that has eluded administrations for nearly 80 years was accomplished.[3] The massive reform of the health care system, the most sweeping change in domestic policy in a generation, phases in over the next several years. Basically, the legislation expands health insurance coverage by requiring "minimal insurance coverage" for individuals and their dependents beginning by 2014, by obtaining coverage through their employers or by purchasing coverage through newly created market places called "exchanges" starting in 2014.[4]

It is critically important to note that individuals are assured that they can maintain existing coverage under a group health plan or other health insurance coverage in which they were enrolled on the date of enactment of the PPACA which was March 23, 2010.[5] That is the case whether or not the individual renews the coverage after March 23, 2010.[6]

The legislation provides qualifying taxpayers with household income up to 400 percent of the federal poverty line a refundable health insurance premium assistance credit after 2013 on a sliding scale basis.[7]

Small business coverage

Starting with 2010 taxes, small businesses with fewer than 25 full-time equivalent employees[8] paying at least 50 percent of the health care premiums for their employees qualify for a tax credit up to 35 percent of their premiums.[9] The credit increases to 50 percent after 2014 if insurance is purchased through an exchange. The credit phases out based on the number of employees and average wages.[10] Seasonal worker hours and wages are not counted in determining the number of full-time equivalent employees unless the worker works for the employer on more than 120 days during the taxable year.[11]

Prescription drug coverage for retired employees

Some who have not been familiar with recent tax legislation (or were looking for areas of the new law to criticize) have complained about the increased costs to businesses which have been widely publicized.[12] The costs involved are related to the provision added when The Medicare Part D prescription drug bill[13] passed in 2003. That legislation gave businesses a double subsidy to help cover the cost of providing prescription drug coverage for their retired employees.

The legislation required that 28 percent of the cost of retiree prescription drug plans be paid by the government and businesses were allowed to both exclude that 28 percent subsidy from income *and also deduct that subsidy from their income*. The 2010 legislation changes that arrangement, in 2013. Businesses will still get the same 28 percent subsidy

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and that amount will be tax-free but the subsidy will not be deductible.[14]

Itemized deduction for medical expenses

The 2010 legislation increases the itemized deduction percentage from 7.5 percent to 10 percent but not until 2013.[15] The 7.5 percent amount is continued through 2016 for individuals (or their spouse) who attain age 65 before the end of the taxable year.[16] However, that special provision does not apply for alternative minimum tax purposes (which already required a 10 percent rate for AMT calculations).[17]

Pre-existing conditions

The 2010 law is to establish, within 90 days after the date of enactment, a temporary high risk pool to provide health insurance coverage through 2013 for those with a pre-existing condition, who is a citizen or national of the United States (or is lawfully in the country) and has not been covered with "creditable" coverage.[18] The high risk pool is to provide coverage for those with pre-existing conditions with the insurer's share of the total allowed cost of benefits not less than 65 percent of the costs and that has an out-of-pocket limit not greater than those for high deductible health plans[19] although that limit can be adjusted administratively to meet the 65 percent test.[20]

The Act also prohibits pre-existing condition exclusions or other discrimination based on health status.[21]

Early retirees

The legislation invests $5 billion[22] in a new reinsurance program for early retirees, age 55 and older, eligible spouses, surviving spouses and dependents of the retirees,[23] effective in 2010. A temporary reinsurance program is to be set up not later than 90 days after enactment of the legislation.[24]

Prohibition of discriminatory insurance rates and terms

The new law prohibits discriminatory premium rates (other than based on age (within limits), tobacco use, whether coverage is for an individual or a family and the rating area),[25] guarantees availability of coverage,[26] guarantees renewability of coverage[27] and prohibits discrimination based on health status including health status of dependents based on genetic information.[28]

Lifetime or annual limits on benefits

The 2010 bill prohibits lifetime limits on benefits and prohibits annual limits after 2013.[29] Before 2014, group or individual insurance coverage may only establish a restricted annual limit on the dollar value of benefits for any participant or beneficiary with respect to the scope of benefits that are "essential health benefits" as enumerated in the bill.[30] Annual or lifetime limits may be placed on specific covered benefits that are not "essential health benefits."[31]

Increase in the HI tax for high income taxpayers

Beginning in 2013, an additional 0.5 percent hospital insurance (HI) tax for FICA purposes will be imposed on taxpayers (other than a corporation, estate or trust) receiving wages in excess of $250,000 on a joint return, $200,000 for others.[32] A comparable provision applies for SECA for the self-employed.[33]

To sum up

While the legislation is complex and lengthy, it represents a comprehensive effort to address long-standing shortcomings of health coverage in this country.

ENDNOTES

1 Pub. L. No. 111-152, 111th Cong., 2d Sess. (2010).

2 Pub. L. No. 111-148, 111th Cong., 2d Sess. (2010).

3 See generally 4 Harl, *Agricultural Law* § 28.02[6][d] (2009); Harl, *Agricultural Law Manual* § 4.03[11] (2009); 1 Harl, *Farm Income Tax Manual* § 3.03[14]. [15] (2010 ed.). See also Harl, "Some Highlights From the Patient Protection and Affordable Care Act ," 21 *Agric. L. Dig*. 51 (2010).

4 Patient Protection and Affordable Care Act, § 1501, 111th Cong., 2d Sess. 2010), hereinafter PPACA.

5 PPACA, § 1251(a).

6 *Id*., § 1251(a)(2).

7 PPACA Sec. 1401, adding I.R.C. Sec. 36B; Reconciliation Act Sec. 1001.

8 PPACA § 1421, adding I.R.C. Sec. 45R(d)(1).

9 PPACA, § 1421, adding I.R.C. § 45R. See IR-2010-38. See also http://www.irs.gov/newsroom/article/0,,id=220839,00.html (questions and answers on new credit for small employers).

10 PPACA, § 1421, adding I.R.C. § 45R(c).

11 I.R.C. § 45R(d)(5).

12 See, e.g, the Wall Street Journal, p. B3, April 1, 2010 ($1 billion for AT&T, $150 million for Deere & Co. and Boeing).

13 Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 1202(a), 117 Stat. 2066 (2003).

14 See I.R.C. § 139A, amended by Pub. L. No. 111-148, 111th Cong., 2d Sess. (2010).

15 PPACA § 9013(a), amending I.R.C. Sec. 213(a).

16 *Id*., § 9013(b), adding I.R.C. § 213(f).

17 I.R.C. § 56(b)(1)(B), as amended by PPACA, § 9013(c).

18 PPACA § 1101(a), (d).

19 I.R.C. § 223(c)(2).

20 PPACA, § 1101(c)(2).

21 PPACA, § 1201, amending 42 U.S.C. § 2704.

22 PPACA § 1102(e).

23 PPACA § 1102(a).

24 *Id*.

25 PPACA § 1201, amending 42 U.S.C. § 2701.

26 *Id*., § 2702.

27 *Id*., § 2703.

28 *Id*., § 2705.

29 PPACA § 10101, amending 42 U.S.C. § 2711(a).

30 PPACA §§ 10101(a), 1302(b).

31 PPACA § 10101(a), adding 42 U.S.C. § 2711(b).

32 PPACA § 9015(a), amending I.R.C. § 3121(b).

33 *Id*., § 9015(b), amending I.R.C. § 1401(b).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

FENCE. The plaintiff purchased land neighboring the defendants' farm. The plaintiff's previous owner had asked the defendants to remove a section of fence at one common corner to allow access to a field. The fence had been constructed on the previous owner's property, although the owner and the defendants treated the fence as their common boundary line for over 10 years. The plaintiff argued that the removal of the fence at the corner and use of the land for access for over 15 years transferred title to the previous owner by acquiescence. After a dispute between the parties, the defendants replaced the fence to prevent access and the plaintiff sued for removal of the fence as a trespass. The court held that the defendants had acquired title to the disputed land when the fence became acknowledged by the defendants and previous owner for over 10 years and that the granting of permission to use the disputed land for access did not return title by acquiescence to the previous owner or the plaintiff upon the sale of the property. **Walter v. Keith, 2010 Mich. App. LEXIS 203 (Mich Ct. App. 2010)**.

FEDERAL FARM PROGRAMS

AGRICULTURAL WATER ENHANCEMENT PROGRAM. The NRCS has announced the availability of approximately $20.7 million in Agricultural Water Enhancement Program (AWEP) financial assistance during fiscal year 2010 to support new AWEP projects. The AWEP is a voluntary conservation initiative that provides financial and technical assistance to agricultural producers to implement agricultural water enhancement activities on agricultural land for the purposes of conserving surface and ground water and improving water quality. As part of the Environmental Quality Incentives Program, AWEP operates through program contracts with producers to plan and implement conservation practices in project areas established through partnership agreements. **75 Fed. Reg. 16719 (April 2, 2010)**.

CROP INSURANCE. The FCIC has adopted as final regulations governing the Common Crop Insurance Regulations, Basic Provisions, Small Grains Crop Insurance Provisions, Cotton Crop Insurance Provisions, Sunflower Seed Crop Insurance Provisions, Coarse Grains Crop Insurance Provisions, Malting Barley Crop Insurance Provisions, Rice Crop Insurance Provisions, and Canola and Rapeseed Crop Insurance Provisions to provide revenue protection and yield protection. The amended provisions replace the Crop Revenue Coverage, Income Protection, Indexed Income Protection, and the Revenue Assurance plans of insurance. **75 Fed. Reg. 15777 (March 30, 2010)**.

FCIC has adopted as final regulations governing the Common Crop Insurance Regulations, Florida Avocado Crop Insurance Provisions, to convert the Florida avocado pilot crop insurance program to a permanent insurance program for the 2011 and succeeding crop years. **75 Fed. Reg. 15603 (March 30, 2010)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION-SKIPPING TRANSFERS. A decedent had established a trust which became irrevocable on the decedent's death prior to September 25, 1985. The decedent's surviving spouse had a power of appointment over the trust and did not exercise the power except to direct that any estate tax from the trust was to be paid from trust corpus. The trust was included in the spouse's estate and paid estate tax on the trust corpus included in the estate. The trust passed to the remainder holders, nieces and nephews of the decedents. Three of the remainder holders in the trust disclaimed their interest in the trust and those shares passed to trusts for each of the disclaimants' children. The decedent spouse's estate paid GSTT on the transfers to the children's trusts but one of the disclaimants filed a refund claim. The parties did not dispute that the transfers resulted in direct skips but the disclaimant argued that the trusts were exempt under the pre-1985 grandfathered trust provisions. The court held that the exercise of the power of appointment by the decedent resulted in a constructive addition and transfer which subjected the trust to GSTT. The appellate court affirmed. **Estate of Timken v. United States, 2010-1 U.S. Tax Cas. (CCH) ¶ 60,591 (6th Cir. 2010), *aff'g*, 2009-1 U.S. Tax Cas. (CCH) ¶ 60,574 (E.D. Ohio 2009)**.

The grantors had established three pre-September 25, 1985 trusts for three children. The trusts provided that, at the death of the last child, the trusts' assets were to be distributed to the remainder holders, the grantors' grandchildren. The trustee obtained court permission to separate the trust into a trust for each child and for each child's children, with pro rata distribution of assets and no change in the trust provisions. The IRS ruled that the separation of the trust did not subject the trusts to GSTT. **Ltr. Rul. 201013030, Nov. 6, 2009**.

Two trusts were created prior to September 25, 1985 for one beneficiary with the remainder held by the beneficiary's four children. The trustee sought to divide the two trusts into four trusts, one for each child, with each child having a testamentary general power of appointment over the trust principal. The power would cause the trusts to be included in each child's estate. The IRS ruled that the division of the two trusts into four trusts would not subject the trusts to GSTT. **Ltr. Rul. 201013027, Nov. 9, 2009; Ltr. Rul. 201013032, Nov. 9, 2009**.

TAXABLE INCOME. The decedent had sold a poultry farm six months before death. The proceeds were deposited in a joint account owned by the decedent and a son. The decedent's estate filed an income tax return for the decedent's last tax year, the portion of the year before the decedent died, and listed the sale but did not pay the tax. The IRS sought to obtain a judgment for the unpaid taxes. The estate argued that the taxes should be the liability of the son, since the son received the proceeds. The court held that, because the decedent realized the income prior to death, the tax liability passed to the decedent's estate, reportable and payable through the final income tax return for the decedent. **United States v Guyton, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,310 (11th Cir. 2010)**.

TRUSTEE/EXECUTOR FEE. The IRS has issued a notice that extends to taxable years which begin before January 1, 2010, the interim guidance provided in *Notice 2008-116, 2008-2 C.B. 1372, and Notice 2008-32, 2008-1 C.B. 593*, on the treatment under I.R.C. § 67 of investment advisory costs and other costs subject to the 2-percent floor under I.R.C. § 67(a) that are integrated as part of one commission or fee paid to a trustee or executor ("Bundled Fiduciary Fee") and are incurred by a trust other than a grantor trust (nongrantor trust) or an estate. **Notice 2010-32, I.R.B. 2010-18**.

VALUATION. The decedent's estate had valued contingent interests in stock held by the decedent. The IRS rejected the valuation and assessed additional taxes. The court found that the stock was essentially worthless on the decedent date of death because the company's business plan failed; therefore, the contingent interests in the stock were worthless, entitling the estate to a refund. **Alan Baer Revocable Trust v. United States, 2010-1 U.S. Tax Cas. (CCH) ¶ 60,590 (D. Neb. 2010)**.

FEDERAL INCOME TAXATION

CHARITABLE CONTRIBUTIONS. The IRS has published 10 tips to help ensure taxpayers' charitable contributions are deductible. (1) Contributions must be made to qualified organizations to be deductible. Taxpayers cannot deduct contributions made to specific individuals, political organizations and candidates. (2) Taxpayers cannot deduct the value of contributed time or services nor the cost of entries for raffles, bingo or other games of chance. (3) If contributions entitle a taxpayer to merchandise, goods or services, including admission to a charity ball, banquet, theatrical performance or sporting event, the taxpayer can deduct only the amount that exceeds the fair market value of the benefit received. (4) Donations of stock or other property are usually valued at the fair market value of the property. Special rules apply to donation of vehicles. (5) Clothing and household items donated must generally be in good used condition or better to be deductible. (6) Regardless of the amount, to deduct a contribution of cash, check, or other monetary gift, taxpayers must maintain a bank record, payroll deduction records or a written communication from the organization containing the name of the organization, the date of the contribution and amount of the contribution. For donations by text message, a telephone bill will meet the record-keeping requirement if it shows the name of the organization receiving the donation, the date of the contribution, and the amount given. (7) To claim a deduction for contributions of cash or property equaling $250 or more you must have a bank record, payroll deduction records or a written acknowledgment from the qualified organization showing the amount of the cash and a description of any property contributed, and whether the organization provided any goods or services in exchange for the gift. One document may satisfy both the written communication requirement for monetary gifts and the written acknowledgement requirement for all contributions of $250 or more. (8) If the total deduction for all noncash contributions for the year is over $500, a taxpayer must complete and attach IRS Form 8283, Noncash Charitable Contributions, to the return. (9) Taxpayers donating an item or a group of similar items valued at more than $5,000 must also complete Section B of Form 8283, which requires an appraisal by a qualified appraiser. (10) To deduct a charitable contribution, taxpayers must file Form 1040 and itemize deductions on Schedule A. For more information on charitable contributions, refer to Form 8283 and its instructions, as well as Publication 526, Charitable Contributions. For information on determining value, refer to Publication 561, Determining the Value of Donated Property. **IRS Tax Tip 2010-60**.

DEPRECIATION. The taxpayer was an S corporation which placed depreciable property in service during the tax year. The property was eligible for the additional first year depreciation deduction under I.R.C. § 168(k)(1). Although the taxpayer wanted to elect out of the additional depreciation deduction, the income tax return failed to make the election. The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201013015, Dec. 2, 2009**.

DISASTER LOSSES. On March 5, 2010, the President determined that certain areas in Oklahoma are 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 winter storm, which began on January 28, 2010. **FEMA-1883-DR.** On March 8, 2010, the President determined that certain areas in California are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on January 17, 2010. **FEMA-1884-DR.** On March 10, 2010, the President determined that certain areas in South Dakota are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on January 20, 2010. **FEMA-1887-DR.** On March 18, 2010, the President determined that certain areas in Arizona are eligible for assistance from the government under the Act as a result of a severe winter storm and flooding, which began on January

18, 2010. **FEMA-1888-DR.** On March 14, 2010, the President determined that certain areas in North Dakota are eligible for assistance from the government under the Act as a result of flooding which began on February 26, 2010. **FEMA-1889-DR.** Accordingly, taxpayers in the areas may deduct the losses on their *2009* federal income tax returns. See I.R.C. § 165(i).

On March 9, 2010, the President determined that certain areas in Kansas are eligible for assistance from the government under the Act as a result of a severe winter storm and snowstorms, which began on December 22, 2009. **FEMA-1885-DR.** On March 9, 2010, the President determined that certain areas in South Dakota are eligible for assistance from the government under the Act as a result of a severe winter storm and snowstorms, which began on December 23, 2009. **FEMA-1886-DR.** Accordingly, taxpayers in the areas may deduct the losses on their *2008* federal income tax returns. See I.R.C. § 165(i).

HOBBY LOSSES. The taxpayer performed accounting services for customers but rarely received payment for the services. The lack of payment resulted in losses in nine of 10 years. In addition, the taxpayer did not keep contemporaneous written records to support deduction of expenses from the activity. The court held that the accounting activity was not a trade or business and that the disallowance of deductions for most of the expenses was proper because of the lack of substantiation. **Elverson v. Comm'r, T.C. Summary Op. 2010-36**.

IRA. The IRS has published a discussion of individual retirement accounts. (1) Taxpayers may be able to deduct some or all of contributions to an IRA. Taxpayers may also be eligible for the Savers Credit formally known as the Retirement Savings Contributions Credit. (2) Contributions can be made to a traditional IRA at any time during the year or by the due date for filing your return for that year, not including extensions. For most people, this means contributions for 2009 must be made by April 15, 2010. Additionally, if taxpayers make a contribution between Jan. 1 and April 15, they should designate the year targeted for that contribution. (3) The funds in an IRA are generally not taxed until the taxpayer receives distributions from that IRA. (4) Taxpayers should use the worksheets in the instructions for either Form 1040A or Form 1040 to figure a deduction for IRA contributions. (5) For 2009, the most that can be contributed to a traditional IRA is generally the smaller of the following amounts: $5,000 or $6,000 for taxpayers who are 50 or older or the amount of your taxable compensation for the year. (6) Taxpayers should use Form 8880, Credit for Qualified Retirement Savings Contributions, to determine whether they are also eligible for a tax credit equal to a percentage of the contribution. (7) Taxpayers must use either Form 1040A or Form 1040 to claim the Credit for Qualified Retirement Savings Contribution or if they deduct an IRA contribution. (8) Taxpayers must be under age 70 1/2 at the end of the tax year in order to contribute to a traditional IRA. (9) Taxpayers must have taxable compensation, such as wages, salaries, commissions, tips, bonuses, or net income from self-employment to contribute to an IRA. If taxpayers file a joint return, generally only one spouse needs to have taxable compensation, however, see Spousal IRA Limits in IRS Publication 590, Individual Retirement Arrangements for additional rules. **IRS Tax Tip 2010-61**.

LIMITED LIABILITY COMPANIES. The IRS has announced an acquiescence in result only for *Thompson v. United States, 2009-2 U.S. Tax Cas. (CCH) ¶ 50,501 (Fed. Cl. 2009)* which held that an interest in an LLC is not a limited partnership interest under the material participation test of Temp. Treas. Reg. § 1.469-5T(e)(3)(i) for purposes of the passive activity loss rules. See Harl, "The Tax court and the U.S. Court of Federal Claims Agree: Members of LLCs and LLPs are not to be Treated as Limited partners," 20 *Agric. L. Dig*. 113 (2009).

PARTNERSHIPS

CHECK-THE-BOX ELECTION. CCH has reported that the following case was appealed to the Sixth Circuit Court of Appeals on Jan. 29, 2010. The taxpayer formed a company to provide temporary employment services. The taxpayer did file a Form 8832, Entity Classification Election, to elect to tax the company as a corporation. The IRS assessed the taxpayer for unpaid employment taxes and the taxpayer challenged the assessment as failing to comply with I.R.C. § 6672 requirements for assessments against entities with more than one owner. The court found that the taxpayer was the sole owner of the company which was treated as a disregarded entity; therefore, the court held that the taxpayer was personally liable for the employment taxes. **Comensoli v. Comm'r, T.C. Memo. 2009-242**.

ELECTION TO ADJUST BASIS. The taxpayer was an LLC taxed as a partnership which redeemed the interests of four partners during one tax year. The taxpayer's tax advisor failed to notify the LLC that it could make the I.R.C. § 754 election to adjust the LLC basis in its assets and no election was made on the LLC tax return. The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201012032, Dec. 4, 2009**.

The taxpayer was an LLC taxed as a partnership and was owned by another company. The parent company was purchased by another company which resulted in the parent company becoming a disregarded entity. The taxpayer inadvertently failed to include an I.R.C. § 754 election to adjust the basis of its property for the year of the acquisition. The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201013025, Nov. 20, 2009**.

PASSIVE ACTIVITY LOSSES. The taxpayers, husband and wife, owned rental real property and filed their joint return with an election to treat all of their properties as a single rental real estate activity under Treas. Reg. § 1.469-9(g)(3). However, the taxpayers failed to include a statement with the income tax return as described in Treas. Reg. § 1.469-9(g)(3). The IRS granted the taxpayers an extension of time to file the statement required by the regulation. **Ltr. Rul. 201013016, Nov. 3, 2010**.

PENALITES. In *Estate of Smith v. Comm'r, 123 T.C. 15 (2004)* the IRS was prohibited from assessing interest on underpayment of tax after the IRS and taxpayer agreed to a Rule 155 computation of overpayment of tax by the taxpayer which was incorporated in a final decision of the court. The decision had resulted in an overpayment of tax although the taxpayer had not paid all of the taxes assessed. The decision was reversed on appeal, *Estate of Smith v. Comm'r, 429 F.3d 533 (5th Cir. 2005)*. In 2004 prior to the appellate decision, the IRS, in a Chief Counsel Notice, had announced that any interest on underpayment of tax is to be included in the Rule 155 calculation as part of a court case. *CC-2004-035*. The IRS has issued a Chief Counsel Notice conforming to the appellate decision and ruling that it is inappropriate to include assessed or unassessed interest in decision documents, stipulations and Rule 155 computations. **CC-2010-006 (March 31, 2010)**.

PENSION PLANS. For plans beginning in April 2010 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 4.65 percent, the corporate bond weighted average is 6.39 percent, and the 90 percent to 100 percent permissible range is 5.75 percent to 6.39 percent. **Notice 2010-36, I.R.B. 2010-17**.

REFUNDS. In a Chief Counsel Advice letter, the IRS ruled that (1) The Service may not make a refund check payable directly to taxpayer's counsel instead of to the taxpayer. (2) The Service should make the refund payable to the spouses whose names appear on a joint return, even thought the taxpayers are divorced. (3) In the case where one spouse has died after the filing of a joint return, the Service should make the refund payable to the spouse whose name appears on the return, since the surviving spouse and/or the duly appointed executor or administrator may negotiate the refund check. (4) In the case where both spouses have died after the filing of a joint return, the Service should make the refund payable to the spouse whose name appears on the return, since the duly appointed executor or administrator may negotiate a decedent's check. Where there is not a duly appointed executor or administrator, the Service should obtain a Form 1310 from the taxpayer's counsel of record. (5) In the case where the taxpayer has died after the filing of an individual return, the Service should make the refund payable to the taxpayer who filed the return, since the duly appointed executor or administrator may negotiate the decedent's check. Where there is not a duly appointed executor or administrator, the Service should obtain a Form 1310 from the taxpayer's counsel of record. **CCA Ltr. Rul. 201012033, Jan. 8, 2010**.

RETURNS. The IRS has updated its list of frivolous positions that have been deemed frivolous by courts or have no basis for validity in existing law. These positions are frivolous for purposes of the I.R.C. § 6702(a) $5,000 penalty for filing frivolous tax returns and the I.R.C. § 6702(b) $5,000 penalty for filing specified frivolous submissions, such as requests for Collection Due Process hearings, applications for installment agreements, offers in compromise, and taxpayer assistance orders. Included in the list are three new positions that relate to fraudulent use of From 1099-OID to obtain a payment or refund from the Treasury Department, excess claims of withheld income tax, and refunds based on purported advance payments to employees of the earned income tax credit. **Notice 2010-33, I.R.B. 2010-18**.

TAX APPEALS. The IRS has published a discussion of the appeal process for the results of a tax return examination or with other adjustments to tax liability. When the IRS makes an adjustment to a tax return, the taxpayer will receive a report or letter explaining the proposed adjustments. This letter will also explain how to request a conference with an appeals office should the taxpayer not agree with the IRS findings on a tax return. In addition to tax return examinations, many other tax obligations can be appealed. Taxpayers may also appeal penalties, interest, trust fund recovery penalties, offers in compromise, liens and levies. Taxpayers are urged to be prepared with appropriate records and documentation to support their position if they request a conference with an IRS appeals employee. Appeals conferences are informal meetings. Taxpayers may represent themselves or have someone else represent them. Those allowed to represent taxpayers include attorneys, certified public accountants or individuals enrolled to practice before the IRS. The IRS Appeals Office is separate from, and independent of, the IRS office taking the action against a taxpayer. The Appeals Office is the only level of administrative appeal within the agency. If a taxpayer does not reach agreement with IRS Appeals or if the taxpayer does not wish to appeal within the IRS, a taxpayer may appeal certain actions through the courts. For further information on the appeals process, refer to Publication 5, Your Appeal Rights and How To Prepare a Protest If You Don't Agree. **IRS Tax Tip 2010-65**.

TAX PAYMENTS. The IRS has published a discussion of 10 important things about making tax payments correctly. (1) Never send cash. (2) If a taxpayer files electronically, the taxpayer can file and pay in a single step by authorizing an electronic funds withdrawal via tax preparation software or a tax professional. (3) Whether a taxpayer files a paper return or electronically, a taxpayer can pay by phone or online using a credit or debit card. (4) Electronic payment options provide an alternative to paying taxes or user fees by check or money order. Taxpayers can make payments 24 hours a day, seven days a week. Visit IRS.gov and search e-pay, or refer to Publication 3611, e-File Electronic Payments for more details. (5) If a taxpayer itemizes, the taxpayer may be able to deduct the convenience fee charged for paying individual income taxes with a credit or debit card as a miscellaneous itemized deduction on Form 1040, Schedule A, Itemized Deductions. The deduction is subject to the 2 percent limit. (6) Enclose payment with the return but do not staple it to the form. (7) If a taxpayer pays by check or money order, make sure it is payable to the "United States Treasury." (8) Always provide the correct name, address, Social Security number listed first on the tax form, daytime telephone number, tax year and form number on the front of the check or money order. (9) Complete and include Form 1040-V, Payment Voucher, when sending payment to the IRS. This will help the IRS process payment accurately and efficiently. (10) For more information, call 800-829-4477 for TeleTax Topic 158, Ensuring Proper Credit of Payments or see Publication 17, Your Federal Income Tax and Form 1040-V. **IRS Tax Tip 2010-67**.

WITHHOLDING TAXES. The IRS has announced the publication of a new form that will help employers claim the special payroll tax exemption that applies to many newly-hired workers during 2010, created by the Hiring Incentives to Restore Employment (HIRE) Act signed by President Obama on March 18. New Form W-11, Hiring Incentives to Restore Employment (HIRE) Act Employee Affidavit, is now posted on IRS.gov, along with answers to frequently-asked questions about the payroll tax exemption and the related new hire retention credit. The new law requires that employers get a statement from each eligible new hire, certifying under penalties of perjury, that he or she was unemployed during the 60 days before beginning work or, alternatively, worked fewer than a total of 40 hours for anyone during the 60-day period. Employers can use Form W-11 to meet this requirement. Most eligible employers then use Form 941, Employer's Quarterly Federal Tax Return, to claim the payroll tax exemption for eligible new hires. This form, revised for use beginning with the second calendar quarter of 2010, is currently posted as a draft form on IRS.gov and will be released next month as a final along with the form's instructions. Though employers need this certification to claim both the payroll tax exemption and the new hire retention credit, they do not file these statements with the IRS. Instead, they must retain them along with other payroll and income tax records. See Harl, "Hiring Incentives to Restore Employment Act (HIRE), Pub. L. No. 111-147, Signed Into Law," 21 *Agric. L. Dig*. 49 (2010). **IR-2010-043**.

LANDLORD AND TENANT

TENANT OR SHARECROPPER. Over nine years, the plaintiffs had entered into oral farm leases of property owned by the decedent. The plaintiffs shared equally costs and profits with the decedent. After the death of the decedent, the executor continued the arrangement for one year. On February 23, 2006, the executor sent a letter to the plaintiffs terminating the lease agreement. Under Mo. Rev. Stat. § 441.050, a termination notice of a farm lease must be given before 60 days before the end of the crop year, March 1 in this case. The executor argued that the plaintiffs were only sharecroppers who are not covered by the statutory termination limit. The court noted that the main distinction between sharecrop leases and tenant leases is that sharecroppers have no possessory interest in the land they farm, usually demonstrated by the sharecroppers living off the land. The executor pointed to the plaintiffs' approval of the decedent's hunting on the land to demonstrate that the plaintiffs did not have full possession of the land. The court noted that the hunting permission did not interfere with the plaintiffs' ability to farm the land and that there was no evidence that the plaintiffs could not refuse such permission. The court also noted that the plaintiffs maintained the property, made repairs, made all crop decisions, and worked with USDA on federal farm program compliance. The court held that the plaintiffs were farm tenants entitled to a termination notice prior to 60 days before the end of the crop year. **Hoffman v. Estate of Siler, 2010 Mo. App. LEXIS 31 (Mo. Ct. App. 2010)**.

STATE TAXATION

AGRICULTURAL USE. The plaintiff owned 10.019 acres of rural land, 0.183 acres of which was covered by a public road. Of the remaining 9.836 acres, a portion was leased to a farmer who used the land to raise crops for sale and hay. The hay was used by the farmer to feed the farmer's animals. The annual hay crop was valued at about $600. The crops were sold for an average amount of about $1400 but the current corn crop was estimated at between $900 and $1800. If the higher price was received, the farmer would clear over $2000 for the crops, not including the hay. The plaintiff sought eligibility for agricultural use valuation of the land under Penn. Stat. § 5490.3 as land devoted to agricultural use. The court noted that the statute applied only to land of at least 10 acres or land which has produced over $2000 in crops annually. The trial court denied the application of the agricultural use valuation because the net acres were less than 10 and the leased crop land produced less than $2000 of crops. The appellate court affirmed, holding that the public road could not be included in the size of the land, since it was not taxable, and the value of the hay and the speculative higher value of the corn could not be used to value the total annual crop. The court noted that the tenant's hay was not taxable income to the tenant under federal tax law, a conclusion not clearly correct from the case facts as narrated by the court; therefore, the hay had no commercial value. **Way v. Berks County Board of Assessment, 2010 Pa. Commw. LEXIS 112 (Pa. Commw. Ct. 2010)**.

IN THE NEWS

PATENTS. The blog "Seed Law" by Craig Raysor of Gillon & Associates reports on a recent decision in Association for Molecular *Pathology v. United States Patent and Trademark Office, 09 Civ. 4515 (S.D. NY. March 29, 2010)*. "Judge Sweet of the Southern District of New York invalidated seven patents linked to detecting genetic predisposition of breast and ovarian cancers of the Utah-based Myriad Genetics last week after granting plaintiff's motion for summary judgment. The plaintiffs were many in number, and consisted of various non-profits and individuals who were unable to receive the test that was a result of all the patents. In a lengthy opinion, the court effectively reversed the policy of the United States Patent and Trade Office that allowed the patenting of isolated DNA after it was purified from the body using common techniques and turned large segments of biotech patents on their collective ear. The case appears here: http://www.genomicslawreport.com/wp-content/uploads/2010/03/Myriad-SJ-Opinion.pdf. **See http://www.seedlaw.blogspot.com/**.

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AGRICULTURAL TAX SEMINARS

by Neil E. Harl

May 4-5, 2010

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The topics include:

Tuesday, May 4, 2010

FARM INCOME TAX

New Legislation

Reporting Farm Income

Leasing land to family entity
Constructive receipt of income
Deferred payment and installment payment arrangements for grain and livestock sales
Payments from contract production
Items purchased for resale
Items raised for sale
Crop insurance proceeds
Weather-related livestock sales
Sales of diseased livestock
Reporting federal disaster assistance benefits
Gains and losses from commodity futures

Claiming Farm Deductions

Soil and water conservation expenditures
Fertilizer deduction election
Farm lease deductions
Prepaid expenses
Preproductive period expense provisions
Paying rental to a spouse
Paying wages in kind
Section 105 plans

Sale of Property

Income in respect of decedent
Sale of farm residence
Installment sale including related party rules
Private annuity
Self-canceling installment notes
Sale and gift combined.

Like-Kind Exchanges

Requirements for like-kind exchanges
"Reverse Starker" exchanges
What is "like-kind" for realty
New like-kind guidelines for personal property
Partitioning property
Exchanging partnership assets

Taxation of Debt

Turnover of property to creditors
Discharge of indebtedness
Taxation in bankruptcy.

Wednesday, May 5, 2010

FARM ESTATE AND BUSINESS PLANNING

The Liquidity Problem

Property Held in Co-ownership

Federal estate tax treatment of joint tenancy
Severing joint tenancies
Joint tenancy and probate avoidance
Joint tenancy ownership of personal property
Other problems of property ownership

Federal Estate Tax

The gross estate
Special Use Valuation
Family-owned business deduction recapture
Property included in the gross estate
Claiming deductions from the gross estate
Marital and charitable deductions
Taxable estate
The unified credit and other credits
Unified estate and gift tax rates
Generation skipping transfer tax
Federal estate tax liens
Undervaluations of property
Reopening an examination

Gifts

Use of the Trust

The General Partnership

Limited Partnerships

Limited Liability Companies

Recent developments on handling losses

The Closely-Held Corporation -

State anti-corporate farming restrictions
Developing the capitalization structure
Tax-free exchanges
Would incorporation trigger a gift because of severance of land held in joint tenancy?
"Section 1244" stock

Status of the Corporation as a Farmer

The regular method of income taxation
The Subchapter S method of taxation

Financing, Estate Planning Aspects and Dissolution of Corporations

Corporate stock as a major estate asset
Valuation discounts
Dissolution and liquidation
Reorganization

Social Security

In-kind wages paid to agricultural labor

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