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**Gift Tax—Limited Partnership Interests:** Taxpayers claimed annual exclusions for gifts of limited partnership interests to their children because the children had an immediate income right and could transfer the interests (i.e. they were gifts of a present interest). The Tax Court denied the exclusion (as gifts of a future interest) after noting that the partnership agreement did not allow capital account withdrawals and prohibited partners from disposing of their interests to third parties without the consent of all partners and only after a purchase option by the other partners with no time limit for exercising the option. *Walter M. Price*, TC Memo 2010-2 (Tax Ct.).

**Income Tax—LLC Member Not Limited Partner for PAL Purposes:** Taxpayer was sole shareholder of an S corporation manufacturer (Millworks) and the managing member of a California LLC (Pasadera) that owned and operated a country club. Consistent with the recent *Garnett* decision [ 132 TC No. 19 (2009) ], the Tax Court concluded that taxpayer did not hold his managing member interest as a limited partner. Because IRC Sec. 469(h)(2) does not apply to taxpayer's membership interest in Pasadera and the IRS conceded that taxpayer met the significant participation activity test under Temp. Reg. 1.469-5T(a)(4) (since his aggregate participation in Millworks and Pasadera exceeded 500 hours each year), taxpayer materially participated in Millworks and Pasadera and properly deducted losses from these two businesses on his 2001 through 2003 returns. *Lee Newell*, TC Memo 2010-23 (Tax Ct.).

**Income Tax—Gift Card Sales by Disregarded Entity:** A taxpayer receiving payment for the sale of goods generally is required to include the payment in income upon receipt, even when the goods are provided in a future tax year. The retailer in this field attorney advice wants to use an exception—the advance payment deferral method found in Reg. 1.451-5 . The retailer is the sole member (owner) of an LLC that is disregarded for federal income tax purposes. The LLC administers the retailer's gift card program and uses the retailer's inventory to redeem the gift cards it sells. The IRS concluded that payments received by the LLC are received for the sale of "goods held by the taxpayer" for advance payment purposes. The LLC was properly treated as an unincorporated division of the retailer, and therefore as the same taxpayer as the retailer, under Reg. 1.451-5(a)(1)(i) . FAA 20100901F.

**Income Tax—Passive Loss Treatment of LLC Interests:** In last year's *Thompson* case [ 104 AFTR 2d 2009-5124 (Ct Fed Claims, 2009)], the IRS disallowed over \$1.9 million in losses because taxpayer's LLC interest was identical to a limited partner interest, since his liability was limited and he did not pass any of the three material participation tests available to limited partners under Temp. Reg. 1.469-5T(e)(2) . However, the Court of Federal Claims disagreed, finding that taxpayer's LLC interest was more akin to a general partner interest than a limited partner interest, so taxpayer could establish material participation using any of the seven tests listed in Temp. Reg. 1.469-5T(a). In an action on decision, the IRS announced its acquiescence in result only in this case, which basically means that the IRS may disagree with the court's treatment of the issue but will not file an appeal in the case.

**Collection against Sole Owner of LLC:** The Tax Court sustained the IRS's efforts to collect employment taxes owed by taxpayer's single member Limited Liability Company (LLC) from taxpayer rather than from the LLC. Although the IRS assessed the tax liability against the LLC under its Employer Identification Number (EIN) rather than under taxpayer's Social Security Number (SSN), the court noted that an individual who is an employer is instructed to apply for and use an EIN for use in the employment context. Taxpayer "put the LLC's EIN on the returns, thereby inducing the IRS to record the employment tax assessments under that number. She could not, by that act, frustrate the principle that a disregarded entity's employment tax liability is the liability of the LLC's sole member . . . . Consequently, when the IRS assessed the employment taxes under the LLC's EIN, [taxpayer] became liable." *Medical Practice Solutions LLC* , TC Memo 2010-98 (Tax Ct.).

**Procedure—Extended Limitations Period for Partnership Items:** The dispute in this supplemental opinion centered on whether an overstatement of basis constitutes an omission from gross income for triggering the extended six-year limitations period under IRC Sec. 6501(e)(1)(A) (taxpayer) and IRC Sec. 6229(c)(2) (partnership). In *Bakersfield Energy Partners* [ 128 TC 207 (2007) , *aff'd*. 103 AFTR 2d 2009-2712 (9th Cir. 2009)], the Tax Court held that a basis overstatement was not an omission from gross income for Section 6501(e)(1)(A) and 6229(c)(2) purposes. The court followed *Bakersfield Energy* when it issued its original opinion in this case on 9/1/09, but on 9/24/09, the Treasury Dept. issued temporary regulations stating that an "understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income" [Temp. Regs. 301.6501(e)-1T and 301.6229(c)(2)-1T ]. Finding that the Supreme Court's opinion in *Colony, Inc.* [ 1 AFTR 2d 1894 (1958) ] displaced the temporary regulations, the Tax Court majority opinion invalidated the temporary regulation (with two concurring opinions reaching the same result, but on narrower grounds). *Intermountain Insurance Service of Vail LLC* , 134 TC No. 11 (Tax Ct.).

**Procedure—Levy on Partnership Draw:** Taxpayer was the managing partner of a law firm organized as a partnership under New York law. Taxpayer wrote checks to himself and the other partner that were characterized as draws or advances "taken against whatever the [firm's] profits were going to be at the end of the year." To collect taxpayer's unpaid taxes, the IRS served tax levies on the firm. In affirming a New York District Court's conclusion that the firm unlawfully failed to honor the levies, the 2nd Circuit rejected the firm's argument that the payment of partnership draws to taxpayer did not constitute "salary or wages" for Section 6331(e) purposes because (1) the time when taxpayer was required to recognize income from the draws for income tax purposes (the partnership's year end) was irrelevant, and (2) Reg. 301.6331-1(b)(1) provides that a continuing levy "attaches to . . . advances on salary or wages made subsequent to the date of the levy." *U.S. v. Moskowitz, Passman & Edelman* , 105 AFTR 2d 2010-2126 (2nd Cir.).

**Simultaneous Gift and Sale of LLC Interests:** In a previous decision [ 133 TC No. 2 (2009) ], the Tax Court agreed with the taxpayer that gifts of LLC interests were not transfers of the underlying assets and thus, discounts for lack of control and marketability could be claimed. The court turned its attention in this memorandum decision to the simultaneous gifting and sale of the LLC interests where the gifted portions were computed to avoid triggering gift taxes and were accompanied by

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sales of the remaining interest in exchange for promissory notes. The court agreed with the IRS's application of the step transaction doctrine to collapse the separate gift and sale transactions into disguised gifts of 50% interests to two trusts. *Suzanne Pierre*, TC Memo 2010-106 (Tax Ct.).

**Income Tax—New Markets Tax Credit:** IRC Sec. 45D authorizes a new markets tax credit for qualified equity investments made to acquire stock in a corporation or a capital interest in a partnership that is a qualified Community Development Entity (CDE). According to a new revenue ruling, when an individual's or partnership's acquisition of a qualified equity investment in a CDE is not made in connection with the individual's or partnership's trade or business (or in anticipation of the trade or business), the allowable Section 45D credit will not be a passive activity credit under IRC Sec. 469. A separate revenue ruling concludes that a qualified equity investment by an LLC classified as a partnership includes cash from a recourse loan to the LLC that the LLC invests as equity in a qualified CDE. Rev. Rul. 2010-16 and Rev. Rul. 2010-17, 2010-26 IRB.

**Income Tax—Partnership Allocations:** Under final revisions to Reg. 1.704-3(a) found in TD 9485, direct and indirect partners are considered when applying the Section 704(c) anti-abuse rule. The final revisions (1) define an *indirect partner* to include, among others, a direct or indirect owner of a partnership, S corporation, or controlled foreign corporation, or direct or indirect beneficiary of a trust or estate, that is a partner in the partnership; and (b) clarify that the principles of IRC Sec. 704(c), together with the allocation methods described in Reg. 1.704-3(b), (c) and (d), only apply to contributions of property to the partnership. However, the revisions do not provide a *de minimis* related-party rule, and given the "factually intensive analysis" required to determine whether a given transaction is abusive, do not include examples describing the types of transactions to which **Income Tax—Partnership Tax Return Statistics:** The IRS has posted tables with tax year 2008 statistics for partnerships to its website (see [www.irs.gov/taxstats/bustaxstats/article/0,,id=97153,00.html](http://www.irs.gov/taxstats/bustaxstats/article/0,,id=97153,00.html)), which include statistics on types of partnerships and specific industrial sectors. Also included are data for partnerships that reported foreign transaction data on the Schedule K (Partners' Distributive Share Items). The statistics cover balance sheets, trade or business income and deductions, portfolio income, rental income, and total net income—classified by industry and size of total assets.

**Series Limited Liability Companies:** Many states allow domestic LLCs or cell companies to designate separate series (or cells) that have their own business or investment purpose, classes of ownership interest, and/or liability limitations. According to proposed revisions to Reg. 301.7701-1 (found in REG-119921-09), series or cells of domestic entities and foreign series or cells that conduct insurance business should be treated for federal tax purposes as entities formed under local law. The classification of a series that is recognized as a separate entity for federal tax purposes is determined under Reg. 301.7701-1(b). For example, assume that an LLC with three members (1, 2, and 3) establishes two series (A and B), with 1 and 2 treated as the owners of Series A and 3 the owner of Series B. Under Reg. 301.7701-1(b), the default classification of Series A is a partnership and of Series B is a disregarded entity.

**Income Tax—Partnership Contribution Disguised Sale:** Taxpayer's subsidiary transferred its assets to a newly formed LLC in exchange for an interest in the LLC and a special distribution of cash. Two years later, the subsidiary sold its interest in the LLC and the taxpayer reported the gain from the sale on its consolidated federal return. The IRS asserted and the Tax Court agreed that the gain should have been recognized in the year the assets were contributed to the LLC because the transfer was a disguised sale under IRC Sec. 707(a)(2)(B). The court found the distribution of cash did not fit within the debt-financed transfer exception to the disguised sale rules and held the taxpayer liable for an accuracy-related penalty under IRC Sec. 6662(a). *Canal Corporation and Subsidiaries*, 135 TC No. 9 (Tax Ct.).

**Procedure—Designation of Tax Matters Partner:** Upon the death of the general partner, Reg. 301.6231(a)(7)-1(f) allows partners shown on the return to hold a majority interest in a partnership at the close of the year, to designate a tax matters partner (TMP) for the tax year after the filing of a partnership return. In this field advice, the general partner and TMP of multiple LLCs treated as partnerships died, and the IRS ruled the partnerships could select the trust where the majority of property passed as the new TMP, provided the trust is the general partner in each of the partnerships at the time of designation. FAA 20103001F.