Current Federal Tax Developments

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Section: 223
Male Sterilization/Contraception Coverage Not Covered by Preventive Care Exception for HDHP Policies

Citation: Notice 2018-12, 3/5/18

The IRS issued guidance that may put at risk the ability of individuals in certain states to participate in health savings accounts (HSAs) beginning in 2020 in Notice 2018-12.

As Tax Analysts reported in covering this Notice, several states, including California, Illinois, Maryland, and Vermont, prohibit cost-sharing for insurance coverage of male sterilization and contraception services. But only Vermont has a "carve-out" for HSA-qualified high deductible health plans (HDHPs).[1]

In order for an individual to make a contribution for a health savings account for a month, a taxpayer must have coverage under a qualified high deductible health plan and not have disqualifying coverage.[2] Generally to be an HDHP, a plan must not provide benefits until a deductible has been met.[3] However, under IRC §223(c)(2)(C), the fact that a plan provides certain preventive care benefits without meeting a deductible will not disqualify the plan from HDHP status.

Preventive care is defined under as being care within the meaning of Section 1871 of the Social Security Act, except as otherwise defined by the IRS. The Affordable Care Act provided for mandatory preventive care provisions for health plans by adding Section 2713 to the Public Health Service Act (PHS Act). That, as outlined in the Notice, provided the following:

> *Under section 2713(a)(1) of the PHS Act, evidence-based items or services constitute preventive health services if they have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force (USPSTF) with respect to the individual involved. Also, preventive health services under section 2713(a)(4) of the PHS Act include, "with respect to women, such additional preventive care and screenings not described in paragraph (1) [concerning the USPSTF A or B rated recommendations] as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" (HRSA). HRSA guidelines generally provide for coverage of all Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity. The guidelines, however, do not provide for coverage of benefits or services relating to a man's reproductive capacity, such as vasectomies and condoms. (78 FR 8456 (Feb. 6, 2013) at 8458 n. 3.)*

Notice 2013-57 provided that if an item is a preventive care item under section 2713 of the PHS Act, it would count as preventive care for which a benefit could be provided without having to meet the deductible and still allow a plan to be an HDHP.

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[1] Brett Ferguson, "Vasectomies Don't Make the Cut as Preventive Care," Tax Notes Today, 2018 TNT 44-5, March 6, 2018

[2] IRC §223(c)

[3] IRC §223(c)(2)

But what about the male sterilization/contraceptive provisions being added to state laws? The IRS notes that those are not covered by the current definitions of preventive care which has the following impact:

> *Benefits for male sterilization or male contraceptives are not preventive care under the SSA, and no applicable guidance issued by the Treasury Department and the IRS provides for the treatment of these benefits as preventive care within the meaning of section 223(c)(2)(C). Accordingly, under current guidance, a health plan that provides benefits for male sterilization or male contraceptives before satisfying the minimum deductible for an HDHP under section 223(c)(2)(A) does not constitute an HDHP, regardless of whether the coverage of such benefits is required by state law. An individual who is not covered by an HDHP with respect to a month is not an eligible individual under section 223(c)(1) and, consequently, may not deduct contributions to an HSA for that month. Similarly, HSA contributions made by an employer on behalf of the individual are not excludible from income and wages.*

The IRS, recognizing that these policies are currently and have been in force prior to this notice and that state laws may take time to change, does provide for transition relief for 2018 and 2019:

> *Accordingly, this notice provides transition relief for periods before 2020 (including periods before the issuance of this notice), to individuals who are, have been, or become participants in or beneficiaries of a health insurance policy or arrangement that provides benefits for male sterilization or male contraceptives without a deductible, or with a deductible below the minimum deductible for an HDHP. For these periods, an individual will not be treated as failing to qualify as an eligible individual under section 223(c)(1) merely because the individual is covered by a health insurance policy or arrangement that fails to qualify as an HDHP under section 223(c)(2) solely because it provides (or provided) coverage for male sterilization or male contraceptives without a deductible, or with a deductible below the minimum deductible for an HDHP.*

Of course, there is one other obvious solution—the IRS has been explicitly given authority to define what constitutes preventive care and could simply expand the definition to include these items. While not indicating specifically that the agency would consider doing so before 2020, the Notice does ask for the following comments:

> *The Treasury Department and the IRS continue to consider ways to expand the use and flexibility of HSAs and HDHPs consistent with the provisions of section 223. Accordingly, the Treasury Department and the IRS request comments on the appropriate standards for preventive care under section 223(c)(2)(C) (in particular, the appropriate standards for differentiating between benefits and services that would be considered preventive care and those that would not be considered preventive care) and other issues related to the provision of preventive care under an HDHP.*

Section: 408A
Tax Court Rules Roth IRA Did Not Actually Own the Stock of FSC

Citation: Mazzei v. Commissioner, 150 TC No. 7, 3/6/18

The Tax Court took a different approach in their attempt to dismantle a Roth IRA based tax shelter in the case of *Mazzei v. Commissioner*, 150 TC No. 7 than the approach the Sixth Circuit turned thumbs down on in the case of *Summa Holdings Inc. v. Commissioner*, 848 F.3d 779 (6th Cir. 2017).

In this case the taxpayers' Roth IRAs had formed a Foreign Sales Corporation (FSC), a mechanism that Congress created for a period of time to attempt to give a tax break to taxpayers selling products overseas. Under the provisions of the law applicable to FSCs, it could receive commissions from a manufacturer exporting goods even if it performed no services. These commissions were subject to a significantly lower rate of tax than applied on regular corporations.

In this case the FSC received commission payments from a corporation controlled by the owners of the Roth IRAs and incurred no expenses related to those commissions. The FSC then paid out the amounts as dividends to the Roth IRAs. From 1998 to 2002 $533,057 was transferred to the Roth IRAs using this vehicle.

The *Summa Holdings* case had involved a similar structure, though using a Domestic International Sales Corporation (DISC). In that case the Tax Court had initially ruled the transaction as a sham and denied the deductions to the paying corporation, as well as treating the eventual money going to the Roth IRAs as excess contribution. The corporation's appeal (but not that of the shareholders) was heard by the Sixth Circuit.

The Sixth Circuit noted that, effectively, Congress intended the DISC to be an entity that received payments without holding the organization strictly to the provisions of Section 482, where the IRS could reallocate income to a related corporation. So even if the transaction did not reflect economic reality, it was working exactly as Congress intended. Thus, the Court concluded, the Tax Court erred in disallowing the deductions as a sham.

In this case an appeal would be heard by the Ninth Circuit Court of Appeals, so the Tax Court could have opted to simply ignore the Sixth Circuit analysis and again ruled the entire operation a sham. But the majority of the Court this time decided to take a different approach.

In this case the Court decided to look at who was the actual owner of the FSC corporation. While the Roth IRAs were the nominal owners, the Court found that they were owned for all practical purposes by the Roth IRA beneficiaries.

The Court's analysis begins as follows:

> *Petitioners suggest that when their Roth IRAs formally purchased the FSC, the Roth IRAs thereby acquired the right (represented by the FSC stock) to receive income from the FSC. But a formal purchase does not necessarily mean that for tax purposes the Roth IRAs should be treated as the recipients of income from the FSC; the question is who had power and control over the FSC or over receipt of the dividend income. As the Supreme Court has stated: "The crucial question remains whether the assignor retains sufficient power and control over the assigned property or over receipt of the income to make it reasonable to treat him as the recipient of the income for tax purposes." Commissioner v. Sunnen, 333 U.S. 591, 604 (1948). "[T]axation is not so much concerned with the refinements of title as it is with actual command over the property taxed — the actual benefit for which the tax is paid." Corliss v. Bowers, 281 U.S. 376, 378 (1930).*

The Court, looking at Ninth Circuit precedent and the Supreme Court's ruling in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978), determined that the key issue was whether the Roth IRA owners were "exposed to any downside risk or could have expected any upside benefits from their claimed ownership of the FSC."

The Court found no real downside risk existed to the Roth IRA. The IRAs never paid any costs or fees beyond the $500 they exchanged with the corporation to buy their stock and the

corporate entity meant that they were not exposed to any risk in the investment itself. The Court noted that the $500 investment itself was so small as to be worth ignoring—but then noted even that was overstating the real risk. The Court noted:

> *In any event, petitioners have failed to show that the negligible $500 "purchase price" of the FSC stock amounted to anything more than a fee paid to WGA to set up a new and empty FSC. Nothing in the record suggests that the prearranged $500 "price" bore any relationship to the actual value of what was purportedly purchased, i.e., the FSC stock. At trial the parties agreed that the stock in the FSC was worth only $100 when it was purchased. We note, however, that whether the value of the stock was $500 or $100 at the moment of purchase, the shareholders' agreement (which was entered into simultaneously with the purchase) specifies that, if the Roth IRAs were to sell their FSC stock, the total sale price for all 100 shares was to be $1, rather than $500 or $100. The fixed discrepancy between the predetermined $500 purchase price and the immutable $1 sale price strongly suggests that all but the nominal amount of $1 was a fee for access to the FSC rather than a payment for property. Cf. Hewlett-Packard Co. v. Commissioner, 875 F.3d 494 (9th Cir. 2017) (differentiating between fees and bona fide losses), aff'g T.C. Memo. 2012-135. Consequently, considering the FSC stock in the light of the shareholders' agreement, we conclude that the Roth IRAs paid only $1 for the FSC stock. The rest was a fee. Petitioners have not cited, nor are we aware of, any authority for the proposition that such a fee is capable of lending substance to a series of transactions.*

The Court also rejected the taxpayers' argument that the Roth IRAs were exposed to risk when they reinvested the dividends they received. The Court noted that any contribution is exposed to risk when the Roth IRA invested it, so it did not somehow imbue the FSC stock investment with risk.

The Roth IRA also had no real upside. The Court found that the corporation controlled by the Roth IRA beneficiaries had absolute and unfettered control over the benefits (if any) that the Roth IRAs received, and, absent the ownership relationship, it would make no sense for any commissions to be paid to this organization. Thus, a truly independent owner could not have expected to receive any benefits.

As the Court explained:

> *Injector Co. retained complete control over whether any of its export receipts would flow to the FSC in any year. The commission agreement between petitioners' business and the FSC states: "At all times * * * [petitioners' business] shall have the discretion as to when and how much it wishes to pay FSC and no account receivable shall ever exist between FSC and * * * [petitioners' business]." Consequently, no independent holder of the FSC stock would have been entitled to, or would have expected, any upside; Injector Co. retained complete control over whether any payments would ever be made.*
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> *Furthermore, Injector Co.'s control over upside profits extended beyond the discretion to direct commission payments to the FSC. The commission agreement also allowed Injector Co. to reach into the FSC and take back any payments that had already been made — i.e., under the commission agreement, petitioners' business controlled any profits even after those profits had been paid to the FSC.38*
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> *On these facts, no independent holder of the FSC stock could realistically have expected to receive any benefits (before or after tax) due to its formal ownership of the FSC stock; Injector Co. retained control over any benefits at all relevant times.*

The Court concludes that the Roth IRA beneficiaries, and not the Roth IRAs, were the true owners of the FSC. The Court continues:

> *…[B]ecause petitioners (through various passthrough entities) controlled every aspect of the transactions in question, we conclude that they, and not their Roth IRAs, were the owners of the FSC stock for Federal tax purposes at all relevant times. The dividends from the FSC are therefore properly recharacterized as dividends from the FSC to petitioners, followed by petitioners' contributions of these amounts to their respective Roth IRAs. All of these payments exceeded the applicable contribution limits and were therefore excess contributions. We therefore uphold respondent's determination of excise taxes under section 4973.*

The majority then presents their argument regarding why this ruling is not contrary to the Sixth Circuit's holdings in *Summa Holdings*.

> *The taxpayers before this Court in Summa Holdings I were individual taxpayers (who resided in the First and Second Circuits) and their C corporation (which had its principal place of business in the Sixth Circuit). All of these taxpayers appealed. The only taxpayer before the Court of Appeals for the Sixth Circuit in Summa Holdings II was the C corporation; consequently the issue before that court was limited to whether the commissions paid to the DISC were deductible by the taxpayers' business, i.e., the C corporation. The Court of Appeals for the Sixth Circuit decided that the commissions were deductible but appropriately did not consider the issue of whether the payments to the Roth IRAs were contributions. That shareholder-level issue is among the issues currently before the Courts of Appeals for the First and Second Circuits, to which the individual taxpayers in Summa Holdings I have appealed (under the names Benenson v. Commissioner, Nos. 16-2066 and 16-2067, and Benenson v. Commissioner, No. 16-2953, respectively). Accordingly, as the case presently before us involves only the shareholder-level issue (any corporate-level issues are barred by the statute of limitations), the holding in Summa Holdings II is not directly on point; that opinion did not analyze the payments to the Roth IRAs, the facts specifically relating to those payments, or the ownership of the DISC stock for tax purposes.*

Section: 469
Tax Court Rejects Taxpayer's Reconstruction of Real Estate Hours

Citation: Pourmirzaie v. Commissioner, TC Memo 2018-26, 3/8/18

When taxpayers attempt to reconstruct their hours in activities from memory when they receive an exam notice to sustain their burden of proving qualification as a real estate professional, the result is rarely a successful defense of that assertion. Many of the problems are illustrated in the case of *Pourmirzaie v. Commissioner*, TC Memo 2018-26.

The taxpayers did have several rental properties. The Court listed them as follows:

- A four-unit residential property in San Jose, California (San Jose property);
- A single-family condominium in San Diego, California, in which petitioners owned a partial interest (San Diego property);
- A single-family residence in Tucson, Arizona (Tucson property);
- A single-family condominium in Bremerton, Washington (Bremerton property); and
- A single-family residence in Discovery Bay, California (Discovery Bay property).

The taxpayers did not maintain any sort of log or calendar of the work performed on these properties during the years in question. Nevertheless, on their tax returns for the year in question they took the position that Mrs. Pourmirzaie was a real estate professional.

To be a real estate professional, she needed to show that she both spent more than ½ of the time she spent in businesses in which she actively participated in real estate businesses and that her hours in the real estates business were more than 750 hours. Even though the couple was filing a joint return, a spouse is not allowed to use time performed in the activity by the other spouse to establish real estate professional status.[4]

Since the taxpayers had kept no records at the time, they scrambled to prepare documents to detail their activities from their memories once the examination began. The prepared calendars for two years, and Mrs. Pourmirzaie testified at trial about additional time she believed she spent on the various rentals.

Ultimately, they came up with the following details of hours worked that they proposed showed that the taxpayer was a real estate professional:

> *Petitioners propose that, on the basis of daily entries on the 2010 and 2011 calendars, we find that Mrs. Pourmirzaie spent 790 hours and 949 hours during those years, respectively, at the San Jose property doing, generally, routine cleaning, repairs, gardening, bill paying, and surveillance. They propose that, on the basis of her testimony, we find that she spent 15 to 20 hours a week at the San Jose property carrying out those tasks. They propose that, on the basis of entries in the 2010 and 2011 calendars, we find that Mrs. Pourmirzaie spent 275 hours and 178 hours during those years, respectively, at the San Diego property doing, generally, "remodeling, repairing, and interviewing tenants to rent out the property." On the basis of Mrs. Pourmirzaie's testimony, petitioners propose that we find that she "spent one or two hours per month or year" managing the Tucson property. Petitioners propose no finding with respect to the number of hours that Mrs. Pourmirzaie spent during any of the audit years managing either the Bremerton or the Discovery Bay property. They propose that we find that, in 2010, Mrs. Pourmirzaie spent approximately 1,064 hours on her rental activities and that, in 2011, she spent approximately 1,127 hours on her rental activities.*

As is often the case, when the taxpayers attempt to reconstruct a calendar from memory, the reconstruction collapses upon closer inspection. The Court noted several issues with the calendars:

> *The 2010 calendar has entries for every Saturday and Sunday in 2010 other than Sunday, October 31 (Halloween), and Saturday, December 25 (Christmas Day). The usual, uniform entry for both Saturday and Sunday is, without identifying a location (but we assume the San Jose property), "Weekly Cleaning and Repairing", from 10 a.m. to 6 p.m. on Saturday and from 10 a.m. to 4 p.m. on Sunday. There are occasional entries for time spent in San Diego. There are twice a month entries for midweek "Security Surveillance", uniformly from 8 to 10 p.m., and there are assorted other entries on various dates, such as "Home Depot", "Paperwork and Bill Paying", and "Post Office", some lacking time entries and some, like "Paperwork and Bill Paying", showing twice monthly time entries, usually from 7 to 8 p.m. The 2010 calendar does not specify who, as between Mr. or Mrs. Pourmirzaie, performed the listed tasks.*

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[4] IRC §469(c)(7)

> *The 2011 calendar is similar although it does show monthly totals of hours for each petitioner, totaling, for the whole year, 1,133 hours and 905 hours for Mr. and Mrs. Pourmirzaie, respectively. The 2011 calendar shows 2 hours of surveillance from 8 to 10 p.m. on April 27 and 3 hours on paperwork and bill paying from 7 to 10 p.m. on April 29. Monthly statements for petitioners' checking account at Wells Fargo Bank for the months of April and May 2011 show check card purchases for food and lodging on April 28 and 29 in London, England, and at Heathrow airport. There are no domestic purchases shown for either of those dates. The 2011 calendar shows both petitioners working at an unspecified property from 10 a.m. until 4 p.m. on August 7. The Wells Fargo Bank statement for August 2011 shows food purchases in Dallas, Texas, on that date. The 2011 calendar shows one or both petitioners working at unspecified properties for 40 hours on September 9 through 13. The Wells Fargo Bank statement for September 2011 shows food and other purchases and a cash withdrawal in Philadelphia, Pennsylvania, on those dates. The 2011 calendar shows Mrs. Pourmirzaie working at an unspecified property on October 22 and 23. The Wells Fargo Bank statement for October shows food and other purchases in New York, New York, Boca Raton, Florida, and Philadelphia, Pennsylvania, on those dates.*

Beyond those problems, the Court found other issues with the calendars, noting:

> *We have little confidence that the 2010 and 2011 calendars accurately reflect the dates and the times that petitioners, and, in particular, Mrs. Pourmirzaie, spent at either the San Jose or the San Diego property. The calendars were prepared from memory, after the audit years, during the course of respondent's examination of the audit-year returns, without benefit of any contemporaneous time records. The calendars show an exactitude as to the dates and the times petitioners were at the San Jose and San Diego properties not matched by Mrs. Pourmirzaie's memory at trial, where she testified that, for any 2010 visit to the San Jose property, she could not recollect the time they went or returned and the length of their visit depended on the amount of work to be done. With respect to the San Diego property, she testified that she could not recall how many times she visited the property in 2010 or the types of management activities that she performed. On her visits to San Diego, she added, she stayed longer than was necessary because "I love San Diego."*

Nor did the court accept the assertions made about time spent other that in the calendar. Specifically, the Court found:

> *Mrs. Pourmirzaie testified that she and her husband shared responsibility for management of both properties. She was clear that, on weekends, they both visited the San Jose property for a total of 14 hours each. Her husband, she testified, was a workaholic. Nevertheless, she proposes that we find that she, herself, spent 15 to 20 hours a week at the San Jose property carrying out management tasks. If we add to her suggested totals the 14 hours a week that her husband was at the San Jose property performing management tasks, then we have the couple spending 29 to 34 hours a week managing a four-unit residential apartment building at which they neither kept an office nor stored any tools. Simply stated, we do not believe it.*

The Court did not find that the taxpayers had shown that Mrs. Pourmirzaie spent more than 750 hours in real estate activities in the years in question and, therefore, she was not a real estate professional.

Advisers should take note of this case, because the position of the taxpayers in this case ("we work on the real estate a lot of hours and I'm sure it's more than 750 hours for one of us") is one that advisers will hear often. But when asked if the taxpayers have documentation of the hours they will admit that they don't have it—but, really, they spend a lot of time on these

projects. Often if the adviser points out the problem, the taxpayer will then suggest that they are willing to "take the chance" and claim the deduction.

In this case, the taxpayers were hit with the 20% substantial understatement penalty because the Court found, properly, that there existed no substantial authority for this position. As well, the taxpayers did not offer up evidence that they had reasonable cause and acted in good faith. However, if they had made use of a tax professional (there's no evidence that they did in this case), one way to show reasonable cause and good faith is to claim reasonable reliance on the advice of a competent professional—they would argue the professional had assured them that the position was justified and they signed the return containing that position based on that reliance.

In such a case, an adviser may end up in an extremely difficult position. To sustain that defense, the taxpayer normally will need to either show written advice that counseled them the position was acceptable or have the adviser testify that he/she was asked to advise on the matter and told the taxpayer this was fine. Since the written document generally won't exist (remember, the taxpayer was willing to "take the risk" on the position), the adviser's testimony will be needed.

Of course, the adviser is going to say that he/she did not give that advice. But at that point the client's memory is likely to get hazy ("we never said take the risk, we just wouldn't do that") and regardless of a client's willingness to take on the risk, an adviser would not be able to sign a return taking a position without substantial authority unless the position had a reasonable basis and that position was disclosed on the return. Doing so would be in violation of the AICPA *Statements on Standards for Tax Services No. 1* and IRC §6694, subjecting the preparer to possible discipline and preparer penalties.

Section: 469
Tenants' Inability to Handle Trash Matters Helped Architect Qualify as Real Estate Professional

Citation: Franco v. Commissioner, TC Summary Opinion 2018-9, 3/6/18

His tenants' inability to deal with taking out the trash appears to have been a key factor in allowing the taxpayer in *Franco v. Commissioner*, TC Summary Opinion 2018-9 to qualify as a real estate professional.

Jose Franco is a licensed architect and he ran a small architectural business for the year in question. Normally this would create a significant issue for Mr. Franco to be classified as a real estate professional, since Mr. Franco was not contending that his architectural work was a real property trade or business.

The problem that normally presents in such cases is that the taxpayer is unable to meet the requirement, found in IRC §469(c)(7)(B)(i) that "more than one-half of the personal services performed in trades or businesses by the taxpayer during such taxable year are performed in real property trades or businesses in which the taxpayer materially participates…" Mr. Franco was not attempting to argue that the court should allow him to treat has architectural business as one that was in the business of "construction" or any of the other categories of real property businesses found at IRC §469(c)(7)(C).

But Mr. Franco was not working full time as an architect. His records showed he had performed 109 hours of services for Wells Fargo's trust department and another 540 hours

doing work for construction consulting company. Thus, he had 649 hours in the non-real property business.

So that meant that Mr. Franco merely needed to satisfy the second test under IRC §469(c)(7)(B)(ii). Under that test he had to show he had spent more than 750 hours in services for real property trades and businesses in which he materially participated. Rentals are listed as a real property trade or business under IRC §469(c)(7)(C) and the IRS did not dispute that Mr. Franco was covered by an election under IRC §469(c)(7)(A) to treat all of his rental activities as one.

Under Reg. §1.469-5T(a)(1) if a taxpayer has more than 500 hours of participation in an activity, that will meet the requirement to be treated as materially participating. Thus, if Mr. Franco could show he had 750 hours of participation in his rentals he would automatically be treated as materially participating in the rental. So, the only question is whether Mr. Franco had spent more than 750 hours in the activities.

At first glance it doesn't look good—he owned only two rental properties, though one of them was a four-plex. But Mr. Franco had records to show what he had done regarding these properties and, just as important, his records and testimony were found to be credible.

Of course, 750 hours is still quite a few hours for just these two properties, so to be credible there had to be a plausible reason why Mr. Franco had spent so many hours dealing with these properties.

The Court noted that a number of factors combined to push Mr. Franco's hours over the 750-hour threshold for 2013, not the least of which being the fact that his tenants weren't very good about taking care of the details of the weekly trash pickup.

As the Court describes matters:

> *Mr. Franco managed the rental properties during the year in issue. Because his tenants were not attentive to trash disposal matters, Mr. Franco made weekly trips to the properties to ensure that trash bins were set out for collection, cleaned if necessary, and returned to their storage locations. He also performed minor repairs at the properties, coordinated more substantial repairs with a handyman, communicated with the tenants and collected and deposited rent, maintained insurance policies, purchased materials for the properties as needed, paid bills, and kept books and records of his expenses for tax accounting purposes.*
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> *Two of the four tenants at Edgehill Drive moved out in 2013. As a result, Mr. Franco spent additional time coordinating with them as they vacated the apartments, performed extra repair and maintenance work to ready the apartments for new tenants, placed advertisements listing the apartments for rent, and worked with new tenants as they signed leases and moved into the apartments.*
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> *Mr. Franco was late paying property taxes and insurance premiums on both rental properties during 2013. Consequently, he was obliged to spend time negotiating a property tax installment payment plan and had to work with his mortgage lender to eliminate redundant insurance coverage on the properties.*

He presented the Court with an activity log that showed he had spent 765 and 372 in activities related to each of the rentals. And this log was corroborated by other evidence that Mr. Franco produced (receipts, emails and other records).

The real take-away from this case is to carefully note details about Mr. Franco's rental records:

- The reasons for having what might appear to be excessive hours were well documented, making it plausible that he could have qualified;
- He had activity logs that were real log—not just rough "ballpark estimates" of work he had done; and
- Those logs agreed with outside evidence strongly suggesting that Mr. Franco had been performing the services in question at the times in his log.

The history of cases in this area makes it clear that the key issue will most often come down to whether a taxpayer can produce records of the sort that Mr. Franco did.