argument for self-employment tax liability is the argument that the husband-wife arrangement is a partnership. That assertion should be effectively countered with a showing that no partnership exists under state law and that the requirements for a partnership under the Uniform Partnership Act have not been met.

However, in a different setting, eligibility of co-owned property for like-kind exchange treatment, IRS has persisted in its belief that use of a partnership tax return as a convenient way to report income and deductions makes the property ineligible for like-kind exchange treatment as an interest in a partnership *even though no partnership was intended and no partnership existed under state law*.[43] That position by IRS has not been litigated nor has the position that all CRP payments are subject to self-employment tax regardless of the relationship to a trade or business.

IRS seems to be attempting to redraw the line between what is a trade or business and what is an investment asset. Unless Congress steps in, which appears unlikely, litigation is the only way to resolve the issue.

FOOTNOTES

1 Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

2 See I.R.C. § 1402(a).

3 Id.

4 Id.

5 See News Release, Office of Public Affairs, United States Department of Agriculture, January 7, 1991.

6 See 7 U.S.C. § 1308(e) for a discussion of what is a "person" under the payment limitation rules.

7 7 U.S.C. § 1308(e)(2)(C)(ii); 7 C.F.R. § 1400.105(a)(2).

8 7 U.S.C. § 1308(e)(2)(C)(i); 7 C.F.R. § 1400.105(a).

9 7 U.S.C. § 1308-1(b).

10 7 U.S.C. § 1308-1(b)(2)(A)(ii); 7 C.F.R. § 1400.201(d)(1).

11 7 U.S.C. § 1308-1(b)(2)(A)(iii); 7 C.F.R. § 1400.201(d)(2).

12 7 U.S.C. § 1308-1(b)(2)(A)(i); 7 C.F.R. § 1400.202.

13 7 C.F.R. § 1400.201(c).

14 7 C.F.R. § 1400.208.

15 I.R.C. § 1402(a).

16 I.R.C. § 1402(c).

17 E.g., Batok v. Comm'r, T.C. Memo. 1992-727 (one month's work installing windows not a continuous and regular activity and not a trade or business).

18 Stanton v. Comm'r, 399 F.2d 326 (5th Cir. 1968).

19 Wang v. Comm'r, 2002-1 U.S. Tax Cas. (CCH) ¶ 50,443 (9th Cir. 2002).

20 Wilson v. Comm'r, 2003-2 U.S. Tax Cas. (CCH) ¶ 50,614 (9th Cir. 2003).

21 Mayer v. United States, 94-2 U.S. Tax Cas. (CCH) ¶ 50,509 (Cls. Ct. 1994).

22 Sloan v. Comm'r, T.C. Memo. 1988-294.

23 For a full list of cases on "trade or business" status under I.R.C. § 162, see Harl, *Farm Income Tax Manual* § 1106(a) (2006 ed.).

24 480 U.S. 23 (1987).

25 *Id.*

26 I.R.C. § 1402(a)(1).

27 *Id.*

28 Norwood v. Comm'r, T.C. Memo. 2000-84.

29 *Id.*

30 *Id.*

31 *E.g.*, Craig v. United States, 451 F. Supp. 378 (D. S.D. 1978); Kjorvestad v. United States, 81-1 U.S. Tax Cas. (CCH) ¶ 13,401 (D. N.D. 1981).

32 Uniform Partnership Act § 6 (hereinafter UPA).

33 UPA § 7(3).

34 UPA § 7(4). See Tarnavsky v. Tarnavsky, 147 F.3d 674 (8th Cir. 1998) (sharing of expenses sufficient to give rise to partnership especially where income retained by partnership and income tax returns allocated income to partners).

35 I.R.C. § 761(a).

36 I.R.C. § 761(a)(1).

37 Small Business and Work Opportunity Tax Act of 2007, Pub. L. No. 110-28, § 8215(a).

38 I.R.C. § 761(f).

39 I.R.C. § 761(f)(2).

40 I.R.C. § 469(h)(1).

41 See Harl, "IRS's Take on 'Trade or Business,'" 114 *Tax Notes* 348 (2007).

42 See Notice 2006-108, 2006-2 C.B. 1118; CCA Ltr. Rul. 200325002, May 29, 2003.

43 Ltr. Rul. 9741017,. July 10, 1997 (co-ownership of rental properties deemed partnership; partnership returns filed for five years). See Rev. Proc. 2002-22, 2002-1 C.B. 733.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

EXCLUSIVE POSSESSION. The plaintiff was the record owner of a 300 acre farm which was the disputed land in this case. The defendant claimed title to the disputed land by adverse possession resulting from grazing activities on the disputed land for over 15 years. The evidence showed that the plaintiff had leased a portion of the land to the defendant's father and had leased another portion to a state university for research. The trial court ruled that the defendant had not shown title by adverse possession because the evidence showed that other parties, governmental agencies and the plaintiff had possession of and made use of portions of the disputed property during the 15-year period. **Weyerheauser Co. v. Brantley, 2007 U.S. App. LEXIS 29525 (10th Cir. 2007),** ***aff'g on point*****, 2006 U.S. Dist. LEXIS 62425 (E.D. Okla. 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

GENETICALLY MODIFIED ORGANISMS. The APHIS has announced that it intends to prepare an environmental impact statement in connection with making a determination on the status of the Monsanto Company and Forage Genetics International alfalfa lines designated as events J101 and J163 as regulated articles. This notice identifies potential issues and alternatives that will be studied in the environmental impact statement and requests public comment to further delineate the scope of the issues and regulatory alternatives. The announced follows a ruling in *Geertson Seed Farms, Inc. v. Johanns, 2007 U.S. Dist. LEXIS 14533 (N.D. Calif. 2007) and Geertson Farms, Inc. v. Johanns, 2007 U.S. Dist. LEXIS 21491 (N.D. Cal., 2007)* where the court held that an environmental impact statement was required because the plaintiffs demonstrated that the GE alfalfa could contaminate non-GE varieties even with the buffer zones and result in a significant environmental impact. **73 Fed. Reg. 1198 (Jan. 7, 2008)**.

GENETICALLY MODIFIED ORGANISMS. The U.S. Supreme Court has denied certiorari in the following case. The plaintiff produced soybean seed, under the brand Roundup Ready, which had been genetically modified to withstand herbicides such as Roundup. The defendant purchased some of these seeds and signed a technology agreement which prohibited the purchaser from saving the seeds for further plantings. The defendant admitted to saving the seeds from the crops and to intending to continue the practice of saving seeds for future crops. The plaintiff filed suit for patent infringement and breach of contract and sought a preliminary injunction to prohibit the defendant from using the saved seed. The trial court granted the preliminary injunction. The defendant argued that the technology agreement was an unfair restraint of trade. The trial and appellate courts held that the technology agreement was not an unfair restraint of trade because the restriction on use of seed was reasonable and did not force the defendant to purchase only Roundup Ready seed in the future. The defendant also argued that the saved seed restriction violated the doctrines of patent exhaustion and first sale. The court held that the doctrines did not apply here because there was no sale involved as to the saved seeds. Finally, the defendant argued that the saved seed restriction violated Section 2543 of the Plant Variety Protection Act (PVPA) which allows for use of saved seed. The court held that the PVPA provision did not apply to utility patents granted under the Patent Act. **Monsanto Co. v. McFarling, 488 F.3d 973 (Fed. Cir. 2007)**.

PEAS. The FCIC has issued proposed regulations which amend the Common Crop Insurance Regulations; Dry Pea Crop Insurance Provisions to include the insurability of additional types of dry peas, to offer winter coverage, to allow replanting payments, and to make chickpeas insurable under the Dry Pea Crop Provisions rather than the Dry Bean Crop Provisions. The changes will apply for the 2009 and succeeding crop years. **73 Fed. Reg. 3411 (Jan. 18, 2008)**.

SUGAR. The CCC has issued the final 2006-crop cane state allotments and company allocations to sugarcane and sugar beet processors for the period from October 1, 2006 through September 30, 2007 (fiscal year 2007). This notice also publishes the 2007-crop (fiscal year 2008) cane state allotments and company allocations based on an 8.450 million short tons, raw value overall allotment quantity of domestic sugar. This applies to all domestic sugar marketed for human consumption in the United States from October 1, 2007, through September 30, 2008. **73 Fed. Reg. 1314 (Jan. 8, 2008)**.

FEDERAL ESTATE AND GIFT TAXATION

ADMINISTRATIVE EXPENSES. The taxpayer was the beneficiary of a testamentary trust established by the taxpayer's deceased parent's will. The trustees had broad authority to invest the trust principal and the trustees hired an investment company to manage the trust's investments. The trust claimed the entire investment company fees as a deduction on line 15a "Other deductions not subject to the 2% floor" of Form 1041 for the trust. The trust argued that I.R.C. § 67(e)(1) allowed full (i.e. not subject to the 2 percent floor) deductions for trusts for costs of administration which would not have been incurred if the property were not held in trust. The trust argued that the trustees were required by their fiduciary duty to seek professional investment advice, which would not be required if the property were held by an individual. The IRS argued that there was no such fiduciary duty under state law and that investment services were commonly used by individuals; therefore, investment services costs were not excluded from the 2 percent floor. The Tax Court and Second Circuit Court of Appeals noted a split in authority in the reported cases, with *Scott v. United States, 328 F.3d 132 (4th Cir. 2003) and Mellon Bank, N.A. v. United States, 265 F.3d 1275 (Fed. Cir. 2001),* holding that investment costs were subject to the 2 percent floor and *O'Neill v. Comm'r, 994 F.2d 302 (6th Cir. 1993), rev'g. 98 T.C. 227 (1992)* holding that investment costs were not subject to the 2 percent floor. The Tax Court decided to follow the holdings of *Scott* and *Mellon Bank* to hold that the investment costs were subject to the 2 percent floor because investment services were not unique to trusts and were not required by any fiduciary duty. The Second Circuit affirmed. The U.S. Supreme Court affirmed but adopted a different test for deductibility; whether the expense would have been incurred if the trust property was not held in trust. If the expense would not have been incurred but for the existence of the trust, the expense was fully deductible by the trust. **William L. Rudkin Testamentary Trust v. Comm'r, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,132 (S. Ct. 2008), *aff'g*, 467 F.3d 149 (2d Cir. 2006), *aff'g*, 124 T.C. 304 (2005)**. The *Digest* will publish an article by Neil Harl in a future issue. The IRS had issued proposed regulations concerning which estate and non-grantor trust administrative expenses are subject to the 2 percent floor for miscellaneous deductions under I.R.C. § 67(a). The proposed regulations provided that costs incurred by estates or non-grantor trusts that are unique to an estate or trust are not subject to the 2 percent floor. For this purpose, a cost is unique to an estate or trust if an individual could not have incurred that cost in connection with property not held in an estate or trust. To the extent that expenses paid or incurred by an estate or non-grantor trust do not meet this standard, they are subject to the 2 percent floor of I.R.C. § 67(a). (Neither section 67 nor this rule applies to expenses that are excluded under section 67(b) from the definition of miscellaneous itemized deductions, or to expenses related to a trade or business.) Under the proposed regulations, whether costs are subject to the 2 percent floor on miscellaneous itemized deductions depends on the type of services provided, rather than on taxpayer characterizations or labels for such services. Thus, taxpayers may not circumvent the 2 percent floor by "bundling" investment advisory fees and trustees' fees into a single fee. The regulations provide that, if an estate or non-grantor trust pays a single fee that includes both costs that are unique to estates and trusts and costs that are not, then the estate or non-grantor trust must use a reasonable method to allocate the single fee between the two types of costs. The regulations also provide a non-exclusive list of services for which the cost is either exempt from or subject to the 2 percent floor. *72 Fed. Reg. 41243 (July 27, 2007)*. In light of the change in the test to be applied as adopted by the U.S. Supreme Court, the IRS is expected to reissue these proposed regulations to conform with the *Rudkin* decision.

GENERATION-SKIPPING TRANSFERS. An irrevocable trust was established and amended prior to September 25, 1985. The trustees petitioned a state court to convert the beneficiary's income interest to a unitrust interest. The IRS ruled that the conversion of an income interest to a unitrust interest as provided by state law did not subject the trust to GSTT, result in a taxble gift, or cause realization of capital gain. **Ltr. Ruls. 200801011 through 200801036, Sept. 24, 2007**.

MARITAL DEDUCTION. The taxpayer was a surviving spouse who had received an interest in a QTIP trust from the decedent. The decedent's will provided for two trusts: (1) a family trust funded with (a) all assets that are excluded from the decedent's gross estate for federal estate tax purposes, (b) all assets for which the federal estate tax marital deduction is not allowable in the decedent's estate, and (c) an amount that, when added to the value of all interest in property included in the decedent's federal taxable estate, will equal the largest taxable estate on which no federal estate tax is payable after deduction of the credits allowable to the decedent's estate; and (2) a QTIP trust for the taxpayer. Under the QTIP trust agreement the taxpayer was to receive the net income from the QTIP trust at least annually and the trustees could make discretionary distributions of principal to the taxpayer for the taxpayer's support, maintenance, and medical care. The trust provided that, if the taxpayer disclaimed any interest in the QTIP trust, any disclaimed property shall be added to the family trust and distributed as if originally a part thereof. The taxpayer disclaimed an interest in the QTIP trust and agreed to pay any gift tax resulting from the disclaimer, subject to right of recovery under I.R.C. § 2207A(b). The IRS ruled that (1) the taxpayer was treated as making a transfer under I.R.C. § 2519 and I.R.C. § 2511; (2) the taxpayer was personally liable for all gift tax attributable to the transfer; (3) pursuant to I.R.C. § 2519, the value of the taxpayer's remainder interest was equal to the fair market value of the trust assets reduced by the taxpayer's qualifying income interest and the amount recoverable under I.R.C. § 2207A(b), with the standard factors under I.R.C. § 7520 used to determine the value of the remainder interest and disclaimed income interest; (4) no part of the trust was includible in the surviving spouse's gross estate pursuant to I.R.C. § 2044; (5) because the individual's basis in the disclaimed interest was greater than the gift tax recovered, the taxpayer was not liable for income tax as a result of the disclaimer; and (6) because the basis of the trust's assets exceeded their fair market value, their basis was not increased under I.R.C. § 1015(d). For purposes of determining gain, the basis of the assets to the receiver will be the same as their basis at the time of transfer. For purposes of loss, the basis is limited to the fair market value at the time of the disclaimer. **Ltr. Rul. 200801009, Aug. 7, 2007**.

FEDERAL INCOME TAXATION

CHARITABLE DEDUCTIONS. The IRS has issued guidance on the documentation required to substantiate lump-sum charitable contributions made through a Combined Federal Campaign or a similar program, such as a United Way Campaigns. To meet the recordkeeping requirements of I.R.C. § 170(f)(17), Combined Federal Campaign organizations will need to provide the donor with a written communication that includes the name of the donee organization that is the ultimate recipient of the charitable contribution. This is in addition to satisfying the written communication requirements of I.R.C. § 170(f)(8) for contributions of $250 or more. **Notice 2008-15, I.R.B. 2008-4**.

The taxpayer claimed charitable deductions for cash and non-cash charitable contributions. The taxpayer claimed to have made the cash contributions by check but produced no evidence of the checks. The taxpayer also had no written receipts to corroborate the value of the property donated, except for some receipts written by the taxpayer. The court held that the charitable deductions were properly denied for lack of substantiation. **Falodun v. Comm'r, T.C. Summary Op. 2008-5**.

DISCHARGE OF INDEBTEDNESS INCOME. The taxpayer was a publicly traded corporation engaged in the asset finance business whose financing products are offered through a nationwide network of dealers. A class action lawsuit was filed by consumers in one state against the taxpayer alleging violations of state law with respect to asset financing contracts entered into with the taxpayer. The lawsuit alleged several violations of state law, including that the taxpayer charged post-maturity interest and fees in excess of amounts due and that notices related to collections did not meet statutory notice requirements. The taxpayer and class plaintiffs settled the entire class action lawsuit. The settlement agreement provided that the taxpayer, with respect to all lawsuit class members, was to write off any deficiency balances remaining and to write off all charges (interest, fees, etc.). The IRS ruled that the taxpayer was not required to file Forms 1099-C, Cancellation of Debt, with respect to the write-off of balances and charges under the settlement agreement because there was no identifiable event as provided by Treas. Reg. § 1.6050P-1(b)(2) because the discharge occurred by operation of state law. **Ltr. Rul. 200802012, Oct. 4, 2007**.

DISASTER LOSSES. On December 27, 2007, the president determined that certain areas in Missouri are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe winter storms, which began on December 6, 2007. **FEMA-1736-DR**. On

January 4, 2008, the president determined that certain areas in Iowa are eligible for assistance from the government under the Act as a result of severe winter storms, which began on December 10, 2007. **FEMA-1737-DR**. Taxpayers who sustained losses attributable to these disasters may deduct the losses on their *2006* returns. On January 8, 2008, the president determined that certain areas in Nevada are eligible for assistance from the government under the Act as a result of a severe winter storm and flooding, which began on January 5, 2008. **FEMA-1738-DR**. Taxpayers who sustained losses attributable to these disasters may deduct the losses on their *2007* returns.

INSURANCE. The IRS has issued guidance on how individuals should allocate prepaid qualified mortgage insurance premiums and how entities receiving premiums should report them. Individuals who, in 2007, obtained a mortgage that qualifies as acquisition indebtedness on a qualified residence and, in connection with the mortgage, paid a qualified mortgage insurance premium for private mortgage insurance or Federal Housing Association (FHA) mortgage insurance issued in 2007 but extending beyond 2007 may allocate the prepaid premium ratably over the shorter of: (1) the stated term of the mortgage; or (2) 84 months, beginning with the month in which the insurance was obtained, to determine the amount treated as deductible qualified residence interest for 2007. Reporting entities that are required to file the 2007 Form 1098 will be deemed to have satisfied their reporting requirement if they report, in box 4 of Form 1098, either the amount of prepaid qualified mortgage insurance premiums actually received or the amount determined under the 84-month allocation method. **Notice 2008-15, I.R.B. 2008-4**.

LETTER RULINGS. The IRS has issued its annual list of procedures for issuing letter rulings. **Rev. Proc. 2008-1, 2008-1 C.B. 1**.

The IRS has issued its annual list of procedures for furnishing technical advice to District Directors and Chiefs, Appeals Offices. **Rev. Proc. 2008-2, 2008-1 C.B. 90**.

The IRS has issued its annual list of tax issues for which the IRS will not give advance rulings or determination letters. **Rev. Proc. 2008-3, 2008-1 C.B. 110**.

The IRS has issued its annual list of procedures for issuing letter rulings involving exempt organizations. **Rev. Proc. 2008-4, 2008-1 C.B. 121**.

The IRS has issued a revenue procedure which provides guidance for complying with the user fee program of the Internal Revenue Service as it pertains to requests for letter rulings, determination letters, etc., on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division; and requests for administrative scrutiny determinations under Rev. Proc. 93-41, 1993-2 C.B. 536. **Rev. Proc. 2008-8, 2008-1 C.B. 233**.

The IRS has updated procedures regarding the request, issuance and appeal of determination letters and rulings on the exempt status of organizations under I.R.C. §§ 501 and 521 other than those relating to pension, profit-sharing, stock bonus, annuity and employee stock ownership plans. The updated procedures provide guidance on requesting determination letters, the steps taken in issuing determination letters, appealing determination letters, revoking determination letters and when an organization will have sufficiently exhausted administrative remedies allowing for a declaratory judgment proceeding under I.R.C. § 7428. **Rev. Proc. 2008-9, 2008-1 C.B. 258**.

LIENS AGAINST IRS AGENTS AND EMPLOYEES. The taxpayer filed UCC financing statements with the Secretary of State of California, purporting to create liens against the personal property of the IRS Commissioner and several IRS agents. The taxpayers had no relationship with the IRS personnel except as part of their official duties. The court held that the liens were void and of no legal effect. **United States v. Perkins, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,133 (E.D. Calif. 2007); United States v. Roy, 2008-1 U.S. Tax Cas. (CCH) ¶ 50,134 (E.D. Calif. 2007)**.

LIKE-KIND EXCHANGES. CCH has reported that IRS officials have stated that goodwill, subscriber lists and other intangible assets are never like-kind assets and are not eligible for tax-free exchange treatment under I.R.C. § 1031. CCH also reported that IRS Chief Counsel has been asked to provide guidance on whether vacation homes that are partially rented and partially used by the owner qualify as investment property under I.R.C. § 1031. **CCH News-Federal, 2008 TaxDay (Jan. 17, 2008)**.

PARTNERSHIPS.

ELECTION TO ADJUST BASIS. A limited liability company elected to be treated as a partnership for federal tax purposes. The LLC made several liquidating distributions to members in one tax year and intended to make the partnership property basis adjustment election under I.R.C. § 754, had the accountant prepare the election, but failed to include the election in the tax return for the year of the distributions. The IRS granted the LLC a 60-day extension of time to file the election. **Ltr. Rul. 200802001, Sept. 20, 2007**.

PENSION PLANS. For plans beginning in January 2008 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 4.53 percent, the corporate bond weighted average is 5.92 percent, and the 90 percent to 100 percent permissible range is 5.33 percent to 5.92 percent. **Notice 20078-17, I.R.B. 2008-4**.

RETURNS. The IRS has posted the following forms and instructions to its website, www.irs.gov/formspubs/index.html, in the Forms & Pubs section: Instructions for Form 706-NA (November 2007), United States Estate (and Generation-Skipping Transfer) Tax Return; Instructions for Form 1040, 2007 Tax Tables; and Instructions for Forms 8804, Annual Return for Partnership Withholding Tax (Section 1446). The 2007 revision of the Instructions for Form 8615, Tax for Children Under Age 18 With Investment Income of More Than $1,700, has been temporarily removed from the IRS website. The revised version will be posted as soon as it becomes available.

Taxpayers may file their 2007 tax returns electronically beginning January 11, 2008. The IRS's Free File program, which also provides free return preparation, also began January 11, 2008. Taxpayers with an adjusted gross income of $54,000 or less qualify for Free File. The $54,000 threshold applies regardless of the taxpayer's filing status. Some taxpayers will still have to wait to file their returns while the IRS revises certain forms and reprograms its systems in response to the recently enacted alternative minimum tax (AMT) legislation, the Tax Increase Prevention Act of 2007, Pub. L. 110-166. See 19 *Agric. L. Dig.* 1 *supra*. Any 2007 returns e-filed before Monday, February 11, 2008, that include Form 8863, Education Credits; Form 5695, Residential Energy Credit; Schedule 2, Form 1040A, Child and Dependent Care Expenses for Form 1040A Filers; Form 8396, Mortgage Interest Credit; or Form 8859, District of Columbia First-Time Homebuyer Credit, will not be accepted. However, taxpayers who owe the AMT may file immediately if they do not use any of those five forms. The updated forms are on the IRS website, www.irs.gov/formspubs/index.html, and available in paper. **IR-2008-5; IR-2008-6**.

The IRS has identified 43 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) penalty for filing frivolous tax returns and the I.R.C. § 6702(b) 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 four new positions that relate to a misinterpretation of the Ninth Amendment regarding objections to military spending, erroneous claims that taxes are owed only by persons with a fiduciary relationship to the U.S. or IRS, a nonexistent "Mariner's Tax Deduction," or something similar, related to invalid deductions for meals and misuse or excessive use of the credit for fuels under I.R.C. § 6421. **Notice 2008-14, I.R.B. 2008-4**.

SAFE HARBOR INTEREST RATES
February 2008

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	3.11	3.09	3.08	3.07
110 percent AFR	3.43	3.40	3.39	3.38
120 percent AFR	3.74	3.71	3.69	3.68
		Mid-term		
AFR	3.51	3.48	3.46	3.46
110 percent AFR	3.87	3.83	3.81	3.80
120 percent AFR	4.22	4.18	4.16	4.14
		Long-term		
AFR	4.46	4.41	4.39	4.37
110 percent AFR	4.91	4.85	4.82	4.80
120 percent AFR	5.36	5.29	5.26	5.23

Rev. Rul. 2008-9, I.R.B. 2008-5.

S CORPORATIONS

SECOND CLASS OF STOCK. The S corporation had three equal shareholders and made disproportionate distributions to the shareholders over the years of operations. The corporation made corrective distributions to the shareholders such that each had received a total amount equal to each shareholder's proportionate share. The shareholders each represented that they had not received a distribution that was not a nontaxable return of capital, to the extent of the corporation's accumulated adjustment account or in excess of their stock basis. The shareholders each further represent that no distributions had been made that were dividends of accumulated earnings and profits of the corporation (prior C corporation earnings and profits) or capital gains. The shareholders each consented to make such adjustments (consistent with the treatment of the corporation as an S corporation) as may be required by the IRS. The IRS ruled that the corrective distributions did not create a second class of stock or result in termination of S corporation status. **Ltr. Rul. 200802002, Sept. 28, 2007**.

SELF-EMPLOYMENT TAX. The taxpayer was a licensed minister of a church. The taxpayer failed to prove that a Form 4361, Application for Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners, was filed or that the IRS approved the exemption. The court held that the taxpayer was subject to self-employment tax on wages as a minister. **Vigil v. Comm'r, T.C. Summary Op. 2008-6**.

TAX SHELTERS. The IRS issued a notice outlining the four components identifying an intermediary transaction tax shelter (ITTS), which is a listed transaction under Treas. Reg. § 1.6011-4(b)(2), with respect to the types of persons considered to be participants in such transaction. A transaction is characterized as an ITTS if it has four components: (1) a corporation or its successor owns appreciated assets and has insufficient tax benefits to eliminate or offset the gain if such assets were sold (the "built-in tax"); (2) at least 50 percent of the corporation's stock is sold by its shareholders in a non-liquidation transaction within a 12 month period; (3) at the time its shareholders sells at least 50 percent of the corporation's stock, or within the twelve months before or thereafter, the corporation's assets are sold to one or more buyers; and (4) the corporation's built-in tax is purportedly offset, avoided or not paid. In addition, its shareholders will not be considered a participant in an ITTS transaction if the stock its shareholders disposes of is traded on an established securities market. The buyer, will not be treated as a participant if the only assets of the corporation which the buyer acquires are either securities or do no include a trade or business. **Notice 2008-20, I.R.B. 2008-6**.

TRAVEL EXPENSES. The taxpayer claimed deductions for unreimbursed travel expenses. The taxpayer presented only an incomplete travel log which the taxpayer admitted was merely an estimate of miles traveled during the year. The court noted that the log did not distinguish between travel between work and home and travel between business destinations; therefore, the log was insufficient written evidence to support the deductions and the deductions were denied for lack of substantiation. **Falodun v. Comm'r, T.C. Summary Op. 2008-5**.

PRODUCT LIABILITY

PESTICIDE. The plaintiffs were blueberry farmers who used an insecticide manufactured by the defendant. The plaintiffs claimed that the insecticide damaged their blueberry plants and brought an action in strict liability; negligence in formatting, testing, manufacturing, instructing and distributing the insecticide; failure to warn; misrepresentations in marketing brochures as to the effects on the plants; breach of express and implied warranties; and fraud.

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The defendant sought to dismiss the claims as preempted by FIFRA. The court held that the Third Circuit Court of Appeals in *Mortellite v. Novartis, 460 F.3d 483 (3d Cir. 2006)* had applied the standards announced in *Bates v. Dow Agrosciences, 544 U.S. 431 (2005)* in holding that preemption of FIFRA applied to all actions which arose from statements on labels and applied to failure to warn actions if a successful claim created requirements in addition to or different from FIFRA. The plaintiffs argued that written statements in marketing brochures are not preempted because the brochures are not part of the label. The court found that the materials in the brochure were based on information on the insecticide label; therefore, the brochure was considered labeling and actions based on the statements in the brochure were preempted by FIFRA. The court found that the failure to warn claim involved the failure of the defendant to warn about the danger from mixing the insecticide with other farm chemicals during application. The court held that this claim was preempted by FIFRA because it would add requirements in addition to or different from the warnings required on the label. **Indian Brand Farms, Inc. v. Novartis Crop Protection, Inc., 2007 U.S. Dist. LEXIS 94443 (D. N.J. 2007)**.

PROPERTY

PARTITION. The parties were siblings with equal one-third interests in the family farm as tenants in common. The plaintiff filed an action to partition or sell the farm, due to lack of cooperation between the parties. The parties agreed that a partition of the farm would damage everyone's interest, but the parties disagreed as to whether the farm should be sold at public auction or whether the farm should be appraised and the plaintiff's interest sold to the defendants, who lived next to the farm and wanted to maintain it in the family. The farm was zoned for industrial use and could not be used as a private residence. The trial court ordered the farm to be sold at public auction and the proceeds distributed equally among the parties. The defendants challenged the ruling as an abuse of discretion. The appellate court affirmed, noting that none of the evidence was challenged in the appeal, a public auction would bring the highest price for the property based on its zoning, and that the defendants still had an opportunity to bid on the farm in the public auction sale. **Keller v. Keller, 2007 Ind. App. LEXIS 2997 (Ind. Ct. App. 2007)**.