

liquidated or the assets sold. In 1999, the Tax Court rejected that argument in *Jameson v. Commissioner*¹² but the Tax Court decision was ordered vacated and remanded on appeal to the Fifth Circuit Court of Appeal in 2001.¹³ The appellate court stated that the Tax Court had “inappropriately” denied consideration of a full discount for the tax on the built-in gains involved in a case involving timber property.¹⁴ In 2002, the Fifth Circuit decided a second case, *Estate of Dunn v. Commissioner*.¹⁵ In that case, the value of assets was reduced by 34 percent for the tax on built-in gains for a 67.96 percent interest in the corporation. The third case, *Estate of Jelke III v. Commissioner*,¹⁶ involved a reversal of the Tax Court¹⁷ by the Eleventh Circuit Court of Appeal which approved a discount dollar-for-dollar for the tax on built-in gains in addition to discounts, also, for lack of control and non-marketability.

The Tax Court case in 2010

In a case involving the valuation of a summer camp owned by a corporation the shares of which had been placed in a revocable trust, the court allowed dollar-for-discounting for the potential tax on the built-in gains in addition to a discount for lack of marketability.¹⁸ This development is especially notable in that it provides authority nation-wide, including in Courts of Appeal areas where the issue had not been litigated to a court of record.

ENDNOTES

¹ Estate of Jensen v. Comm’r, T.C. Memo. 2010-182.

² See generally 8 Harl, *Agricultural Law* § 58.05[2][c][iii] (2010); Harl, *Agricultural Law Manual* § 7.02[5][d] (2010). See also 2 Harl, *Farm Income Tax Manual* Ch. 7 (2010 ed); Harl, “The Allowable Discount for Potential Income Tax Liability on Corporate Stock at Death,” 18 *Agric. L. Dig.* 177 (2007); Harl, “Discount for Potential Capital Gains Tax Liability in Valuing S Corporation Stock,” 20 *Agric. L. Dig.* 33 (2009). Compare Harl, “Federal Estate Tax Discounts for Potential Income Tax Liability for Retirement Accounts?” 17 *Agric. L. Dig.* 105 (2006)

³ Estate of Dunn v. Comm’r, 301 F.3d 339 (5th Cir. 2002) (value of assets reduced by 34 percent for built-in gains for 67.96 percent interest in corporation); Estate of Jameson v. Comm’r, T.C. Memo. 1999-43, *vac’d and remanded*, 267 F.3d 366 (5th Cir. 2001) (Tax Court “inappropriately” denied consideration of full discount of accrued capital gains; involved timber property).

⁴ Estate of Jelke III v. Comm’r, T.C. Memo. 2005-131, *rev’d*, 507 F.3d 1317 (11th Cir. 2007), *cert. denied*, 129 S. Ct. 168 (2008) (value of interest in closely-held corporation discounted dollar-for-dollar for built-in capital gains tax; discounts also for lack of control and non-marketability).

⁵ Ltr. Rul. 9150001, Aug. 20, 1991 (C corporation; valuation based on net asset value).

⁶ E.g., Eisenberg v. Comm’r, T.C. Memo. 1997-483, *rev’d*, 155 F.3d 50 (2d Cir. 1998), *acq.*, 1999-1 C.B. xix.

⁷ 155 F.3d 50 (2d Cir. 1998).

⁸ 208 F.3d 213 (6th Cir. 2000).

⁹ Eisenberg v. Comm’r, T.C. Memo. 1997-483, *rev’d*, 155 F.3d 50 (2d Cir. 1998), *acq.* 1999-1 C.B. xix.

¹⁰ Dallas v. Comm’r, T.C. Memo. 2006-212.

¹¹ Estate of Litchfield v. Comm’r, T.C. Memo. 2009-21. See Harl, “Discount for Potential Capital Gains Tax Liability in Valuing S Corporation Stock?” 20 *Agric. L. Dig.* 33 (2009).

¹² T.C. Memo. 1999-43.

¹³ 267 F.3d 366 (5th Cir. 2001).

¹⁴ *Id.*

¹⁵ 301 F.3d 339 (5th Cir. 2002).

¹⁶ 507 F.3d 1317 (11th Cir. 2007).

¹⁷ Estate of Jelke v. Comm’r, T.C. Memo. 2005-131.

¹⁸ Estate of Jensen v. Comm’r, T.C. Memo. 2010-182.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

HORSES. The plaintiff was injured when a defendant’s car struck the plaintiff’s car after hitting a horse belonging to another defendant and cared for on another defendant’s property. The plaintiff sued for negligence in confining the horse under the Missouri Stock Law, Mo. Stat. § 270.010, which infers negligence for damages caused by unconfined horses. The defendant argued that the statute applied only to owners of livestock. The trial court had allowed a jury instruction which was based on mere possession as subjecting the defendant to liability for the accident. The appellate court reversed

and remanded the case, holding that the statute clearly refers only to owners of livestock. Although the court acknowledged that possession was a part of ownership, the defendant in this case did not have sufficient rights in the horse to constitute the defendant as an owner of the horse. The case was remanded for possible trial on the issue of other theories of negligence by the defendant. **Gromer v. Matchett, 2010 Mo. App. LEXIS 994 (Mo. Ct. App. 2010).**

The plaintiff was injured during a horse riding lesson at the defendant’s stables. The plaintiff’s horse tripped over some logs placed on the floor of an arena which were to be part of the lesson. When the horse tripped, the plaintiff was thrown onto a portable mounting block which was being used by the students to mount their

horses. The plaintiff alleged negligence in the placing of the logs and mounting block. The trial court granted summary judgment for the defendant under the New Jersey Equine Act, N.J. Stat. § 5:15-1 to 12, holding that the injury resulted from the inherent risks of equine activities. The state court of appeals reversed, holding that summary judgment was inappropriate because an exception in N.J. Stat. § 5:15-9(d) for negligent disregard for the plaintiff's safety or N.J. Stat. § 5:15-9(d) for use of faulty equipment might apply to make the defendant liable. On further appeal, the New Jersey Supreme Court reinstated the trial court's ruling, holding that the statute operated as a complete bar to a claim for negligence once the facts determine that the accident resulted from one of the inherent risks of equine activities. The court also noted that the faulty equipment exception did not apply because the logs and mounting step were not shown to be faulty. **Hubner v. Spring Valley Equestrian Center**, 2010 N.J. LEXIS 702 (N.J. 2010), *rev'g*, 975 A.2d 992 (N.J. Super. App. Div., 2009).

BANKRUPTCY

FEDERAL TAX

AUTOMATIC STAY. The debtors filed for Chapter 13 in 1998 and owed pre-petition taxes. When the debtors filed for bankruptcy the IRS placed a "V-freeze" on the debtors' tax account, preventing any refunds unless separately approved by the IRS. The debtors' confirmed plan provided for payment of priority tax claims. The IRS did eventually make the 1999 refund after the debtors modified their bankruptcy schedules to include the refund amount in the tax claims. In 2000, the debtors filed a complaint against the IRS for violation of the automatic stay in imposing the V-freeze on the debtors' tax account for 1999. The court held that the administrative freeze on the debtors' tax account did not violate the automatic stay because (1) the stay was implemented also to prevent collection efforts which would violate the stay, (2) the freeze helped preserve estate property while the parties modified the bankruptcy plan, (3) the freeze had sufficient procedures for protection of the IRS and debtors' interests, and (4) the length of the freeze for six months was not excessive. *In re Harchar*, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,579 (N.D. Ohio 2010), *aff'g*, 2008-2 U.S. Tax Cas. (CCH) ¶ 50,448 (Bankr. N.D. Ohio 2008).

FEDERAL FARM PROGRAMS

CONSERVATION LOAN PROGRAM. The FSA has adopted as final regulations implementing the Conservation Loan Program authorized by the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill), Pub. L. No. 110-246. **75 Fed. Reg. 54005 (Sept. 3, 2010).**

CROP INSURANCE. The FCIC has adopted as final amendments to the Common Crop Insurance Regulations, Apple Crop Insurance Provisions. The amendments provide policy changes and clarify existing policy provisions to better meet the needs of insured producers, and to reduce vulnerability to program fraud, waste, and abuse. The changes will apply for the 2011 and succeeding crop years. **75 Fed. Reg. 52218 (Aug. 25, 2010).**

NATIONAL ORGANIC PROGRAM. The USDA has issued an interim regulation which amends the National List of Allowed and Prohibited Substances to incorporate a recommendation submitted to the Secretary of Agriculture by the National Organic Standards Board (NOSB) on April 29, 2010. Consistent with the recommendation from the NOSB, the interim rule revises the annotation of one substance on the National List, methionine, to extend its use in organic poultry production until October 1, 2012. **75 Fed. Reg. 51919 (Aug. 24, 2010).**

FEDERAL ESTATE AND GIFT TAXATION

ADMINISTRATIVE EXPENSES. The decedent's will provided for the residuary estate to pass to a trust. The trust borrowed \$1.5 million from a foundation set up by the decedent before death and used the funds for payment of the federal estate tax. The decedent's estate claimed the interest expense for the loan as administrative expense deductions on the federal estate tax return. The trust also claimed the interest expense on the trust's income tax return. The evidence showed that the estate had liquid assets in excess of \$1.9 million and a maximum of \$1.7 in federal estate and state inheritance taxes. The court found that the estate had sufficient assets to pay the estate tax without borrowing; therefore, the interest expense was not necessary for the administration of the estate and not eligible for a deduction against the estate tax. *Estate of Stick v. Comm'r, T.C. Memo. 2010-192.*

ALTERNATE VALUATION DATE. The decedent personal representative timely filed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return which was prepared by a CPA. The CPA prepared the Form 706 without considering the alternate valuation election under I.R.C. § 2032 and no election was made. The error was discovered more than 18 months after the due date (including extensions) of the Form 706. The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201033023, May 19, 2010.**

EQUITABLE RECOUPMENT. The taxpayer had made gifts in several years and filed gift tax returns for the gifts. The amount of gift tax assessed and paid was less than the amount actually due because the IRS failed to account for previous gifts. By the time the decedent died, the statute of limitations on the gift tax for several years had elapsed. The estate claimed the "gift tax payable" for the gifts at the correct amount, i.e. the estate claimed a credit for more gift tax than was actually paid. In a field service advice letter,

the IRS determined that it could not use the doctrine of equitable recoupment to reduce the “gift tax payable” to the amount of gift tax actually paid. The IRS reasoned that (1) the doctrine was available only as a defense against an otherwise valid tax claim by the IRS and (2) the Tax Court did not have sufficient equitable powers to use the doctrine. *FSA Ltr. Rul. 200118002, Dec. 15, 2000*. Legislation passed in 2006, the Pension Protection Act of 2006, Pub. L. No. 109-280, amending I.R.C. § 6214(b), granted the Tax Court the authority to use the equitable recoupment remedy to the extent available for federal district courts and the Court of Federal Claims. In a Chief Counsel Advice letter, the IRS ruled that the change in the law did not change the holding in *FSA Ltr. Rul. 200118002*. **CCA 201033030, May 11, 2010.**

GENERATION-SKIPPING TRANSFERS. The decedent had created two irrevocable trusts prior to September 25, 1985 which currently had ten grandchildren as beneficiaries. The trustee had the power to terminate the trusts at any time and decided to terminate the trusts and distribute the trust property to two sets of ten trusts, two for each current beneficiary. The trusts’ principals were distributed pro rata among the new trusts. The IRS ruled that the division of the two trusts into ten trusts each did not subject the trusts to GSTT. **Ltr. Rul. 201033025, May 13, 2010.**

REFUND. The decedent’s estate executor filed for an extension of time to file the estate tax return and paid the estimated taxes. The estate received a six month extension but still failed to file a return. The estate filed for a second extension but the IRS refused an extension to file the return, although it allowed an extension to pay the estate tax. The estate claimed that it did not receive the denial of the second extension nor two delinquency notices sent a few months later. The estate filed the return within the period of the second requested, but denied, extension and the return claimed a refund of a portion of the estimated tax payment made with the first extension. The refund was paid. Three years later, the estate filed an amended estate tax return which claimed an additional refund amount. This refund claim was denied by the IRS. The court held that, although the refund claim was timely made, the statute of limitations had expired on the additional refund because the estimated taxes were paid more than three years back plus any extension. Because the second extension was not allowed by law, only the first extension could increase the three year period. **Dickow v. United States, 2010-2 U.S. Tax Cas. (CCH) ¶ 60,599 (D. Mass. 2010).**

FEDERAL INCOME TAXATION

ALTERNATIVE FUEL PROPERTY CREDIT. The taxpayer owned and operated a hydrogen refueling station that was used to refuel fork lift trucks which operated on hydrogen fuel. Under *Notice 2007-43, 2007-1 C.B. 1318*, the definition of qualified alternative fuel vehicle refueling property was determined under I.R.C. § 179A(d) which uses the definition of motor vehicle in I.R.C. § 179A(e)(2) as vehicles manufactured primarily for use

on public streets and highways. Therefore, the IRS ruled that the fork lift trucks were not motor vehicles because the trucks were not manufactured primarily for use on public streets and highways. **Ltr. Rul. 201034007, May 18, 2010.**

AMERICAN OPPORTUNITY CREDIT. The IRS has published important facts about the American Opportunity Tax Credit. (1) This credit, which expands and renames the existing Hope Credit, can be claimed for qualified tuition and related expenses that taxpayers pay for higher education in 2009 and 2010. Qualified tuition and related expenses include tuition, related fees, books and other required course materials. (2) The credit is equal to 100 percent of the first \$2,000 spent per student each year and 25 percent of the next \$2,000. Therefore, the full \$2,500 credit may be available to a taxpayer who pays \$4,000 or more in qualifying expenses for an eligible student. (3) The full credit is generally available to eligible taxpayers who make less than \$80,000 or \$160,000 for married couples filing a joint return. The credit is gradually reduced, however, for taxpayers with incomes above these levels. (4) Forty percent of the credit is refundable, so even those who owe no tax can get up to \$1,000 of the credit for each eligible student as cash back. (5) The credit can be claimed for qualified expenses paid for any of the first four years of post-secondary education. (6) Taxpayers cannot claim the tuition and fees tax deduction in the same year that they claim the American Opportunity Tax Credit or the Lifetime Learning Credit. Taxpayers must choose to either take the credit or the deduction whichever is more beneficial. **IRS Summertime Tax Tip 2010-23.**

BUSINESS EXPENSES. The taxpayers, husband and wife, were employed as an airline pilot and registered nurse. The taxpayers lived on a rural property owned by the wife’s parent and cleared the land around their mobile home. The taxpayers purchased some chickens and sold a few eggs. The taxpayer also purchased two emus and sold the feathers for fishing lures. The taxpayer maintained no separate books of farm income and expenses but produced receipts for their farm expenses. The taxpayers filed Schedule F, claiming \$636 in income and \$15,000 in expenses for 2003 and \$750 in income and \$19,000 in expenses in 2004. The court held that the loss deductions from the farm were not allowed because the taxpayers failed to provide evidence that the farm activity was carried on with sufficient continuity and regularity to constitute a trade or business. **Stenslet v. Comm’r, T.C. Summary Op. 2010-127.**

CHARITABLE DEDUCTIONS. The IRS has provided information on deducting charitable donations. (1) Charitable contributions must be made to qualified organizations to be deductible. Taxpayers can ask any organization whether it is a qualified organization and most will be able to tell the taxpayer. Taxpayers can also check IRS Publication 78, Cumulative List of Organizations, which lists most qualified organizations. IRS Publication 78 is available at www.irs.gov. (2) Charitable contributions are deductible only if the taxpayer itemizes deductions using Form 1040, Schedule A. (3) The taxpayer generally can deduct cash contributions and the fair market value of most property donated to a qualified organization. Special rules apply to several types of donated property, including clothing or

household items, cars and boats. (4) If the taxpayer's contribution entitles the taxpayer to receive merchandise, goods, or services in return – such as admission to a charity banquet or sporting event – the taxpayer can deduct only the amount that exceeds the fair market value of the benefit received. (5) Taxpayers need to keep good records of any contribution, regardless of the amount. For any contribution made in cash, the taxpayer must maintain a record of the contribution such as a bank record – including a cancelled check or a bank or credit card statement – a written record from the charity containing the date and amount of the contribution and the name of the organization, or a payroll deduction record. (6) Only contributions actually made during the tax year are deductible. For example, if the taxpayer pledged \$500 in September but paid the charity only \$200 by Dec. 31, the deduction would be \$200. (7) Include credit card charges and payments by check in the year they are given to the charity, even though the taxpayer may not have paid the credit card bill or had the bank account debited until the next year. (8) For any contribution of \$250 or more, you the taxpayer must have written acknowledgment from the organization to substantiate the donation. This written proof must include the amount of cash and a description and good faith estimate of value of any property contributed, and whether the organization provided any goods or services in exchange for the gift. (9) To deduct charitable contributions of items valued at \$500 or more you must complete a Form 8283, Noncash Charitable Contributions, and attach the form to your return. (10) An appraisal generally must be obtained if the taxpayer claims a deduction for a contribution of noncash property worth more than \$5,000. In that case, the taxpayer must also fill out Section B of Form 8283 and attach the form to the return. For more information see IRS Publication 526, Charitable Contributions, and for information on determining value, refer to Publication 561, Determining the Value of Donated Property. **IRS Summertime Tax tip 2010-21.**

DEDUCTIONS. The taxpayer failed to file tax returns for several tax years and the IRS filed substitute returns with which to assess unpaid taxes. In those returns, the IRS used only the standard deduction. In appealing the assessments, the taxpayer claimed to be eligible for itemized deductions in excess of the standard deduction amount. The Tax Court held that an election to itemize deductions had to be made on a return filed by the taxpayer; therefore, the taxpayer was entitled only to the standard deduction since the taxpayer did not file any returns for the years in issue. The appellate court affirmed in a decision designated as not for publication. **Jahn v. Comm'r, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,577 (3d Cir. 2010), aff'g, T.C. Memo. 2008-141.**

DEPRECIATION. The taxpayer owned and operated an apartment community which was a residential rental property, and related 5-year property and 15-year property placed in service in one tax year. These were the only depreciable properties placed in service by the taxpayer in the taxable year. The taxpayer determined its depreciation deductions attributable to the properties using the general depreciation system of I.R.C. § 168(a) instead of the alternate depreciation system (ADS). The taxpayer, however, had intended to elect to use the ADS to

depreciate costs attributable to the properties due to cost overruns related to the construction of the property. The taxpayer relied on a qualified tax professional to prepare its federal income tax return for the taxable year but the election was not made to use the ADS to determine depreciation for the classes of properties placed in service during the taxable year. The IRS granted the taxpayer an extension of time to make the election to use ADS. **Ltr. Rul. 201033002, May 7, 2010.**

DISASTER LOSSES. On August 10, 2010, the President determined that certain areas in Kansas 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 storms, flooding and tornadoes, which began on June 7, 2010. **FEMA-1932-DR.** On August 11, 2010, the President determined that certain areas in Wisconsin are eligible for assistance from the government under the Act as a result of severe storms, flooding and tornadoes which began on July 20, 2010. **FEMA-1933-DR.** On August 17, 2010, the President determined that certain areas in Missouri are eligible for assistance from the government under the Act as a result of severe storms, flooding and tornadoes which began on June 12, 2010. **FEMA-1934-DR.** On August 19, 2010, the President determined that certain areas in Illinois are eligible for assistance from the government under the Act as a result of severe storms and flooding which began on July 20, 2010. **FEMA-1935-DR.** Accordingly, taxpayers in the areas may deduct the losses on their 2009 federal income tax returns. See I.R.C. § 165(i).

DISCHARGE OF INDEBTEDNESS. In 1994 a bank foreclosed on the taxpayer's property and in 1995 obtained a deficiency judgment against the taxpayer. In the same year, the loan was "charged off" for over \$90,000. The bank made some collection attempts but failed because the bank had the wrong name for the taxpayer and failed to reach the taxpayer with proper notice of the debt. All activity ceased in 2003 but in 2006, the bank issued a Form 1099-C with the \$90,000 reported as income from cancellation of debt. The IRS presented evidence only of a letter from the bank that according to its records, the Form 1099-C was issued in the proper year. The issue was the year in which an identifiable event occurred that produced the cancellation of the debt. The court noted that all collection activities ceased in 2003. In addition, the court stated that a rebuttable presumption applied that the debt has been discharged where no payments have been made for at least three years. The facts demonstrated that the taxpayer abandoned the house in 1993 and made no payments since that time. Because the IRS failed to provide any evidence that the bank had a debt collection policy or activity which created an identifiable event in 2006, the court held that the debt was presumed to have become discharged in a year prior to 2006; therefore, the taxpayer did not have discharge of indebtedness income in 2006. **Gaffney v. Comm'r, T.C. Summary Op. 2010-128.**

DOMESTIC PRODUCTION DEDUCTION. The taxpayer was a farmers' cooperative operating a grain marketing and farm supply business. The taxpayer sold grain to livestock producers for feed; to grain processors to be used to produce ethanol, high-fructose corn sweetener and other products; to soybean processors to be

crushed and sold as soybean meal, oil and other further refined products; and to others for resale, both domestically and in the export market. The taxpayer's grain business consisted of buying grain from patrons, handling and storing the grain at its elevators, and then selling the grain to terminal grain elevators, grain processors, feed lots, grain exporters and others. The taxpayer did not operate with a pooling system and paid patrons a market price for commodities under a variety of contract arrangements. The taxpayer paid a patronage dividend to its members and other patrons eligible to share in patronage dividends with respect to the grain they market through the taxpayer. The IRS ruled that grain payments to members and other patrons eligible to share in patronage dividends constituted "per-unit retain allocations paid in money" within the meaning of I.R.C. § 1382(b)(3); therefore, for purposes of computing the taxpayer's I.R.C. § 199 domestic production activities deduction, the taxpayer's qualified production activities income and taxable income could, pursuant to I.R.C. § 199(d)(3)(C), be computed without regard to any deduction for grain payments to members and other patrons eligible to share in patronage dividends. **Ltr. Rul. 201034015, May 26, 2010.**

EMPLOYEE BENEFITS. *Rev. Rul. 2003-102, 2003-2 C.B. 559*, holds that reimbursements by an employer of amounts expended for medicines or drugs available without a prescription are excludable from gross income under I.R.C. § 105(b). Section 9003 of the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148 (March 23, 2010), adds I.R.C. § 106(f) and amends I.R.C. §§ 223(d)(2)(A), 220(d)(2)(A). These sections revise the definition of medical expenses after December 31, 2010, and apply to health flexible spending arrangements, health reimbursement arrangements, Health Savings Accounts, and Archer Medical Savings Accounts. These sections provide that a medicine or a drug shall be treated as medical expenses only if such medicine or drug is prescribed (regardless of whether the medicine or drug requires a prescription). Because the definition of medical expenses has been changed, the IRS has concluded that the ruling position stated in *Rev. Rul. 2003-102* is no longer determinative. **Rev. Rul. 2010-23, I.R.B. 2010-39.** The IRS also issued guidance that positively states that, in accord with the new law, a medicine or a drug shall be treated as medical expenses only if such medicine or drug is prescribed (regardless of whether the medicine or drug requires a prescription). **Notice 2010-59, I.R.B. 2010-39.**

HEDGING. The taxpayer was in the commodities business in which the taxpayer purchased commodities for inventory, processed the commodities and resold them to customers. The taxpayer also entered into hedging transactions but did not identify the hedging transactions. The taxpayer sought to identify the transactions so as to have the gains and losses recharacterized as ordinary gains and losses. The taxpayer claimed that the initial failure to identify the transactions was inadvertent. In a Chief Counsel Advice letter, the IRS refused to allow the untimely retroactive identification of the transactions as hedges because, in a previous audit, the taxpayer had not identified the hedging contracts. **CCA 201034018, April 20,**

2010.

INTEREST INCOME. The taxpayer held funds in several certificates of deposit (CDs). The banks reported the interest income on Form 1099-INT on an annual basis but the taxpayer included in taxable income only the interest on CDs which matured during the tax year. The taxpayer argued that, until a CD matured, the amount of interest was contingent because the CD was subject to early termination penalties. Therefore, under Treas. Reg. § 1.451-2, the interest was not taxable until maturity of the CD. The taxpayer pointed to several instances in which the condition of a bank forced the taxpayer to terminate CDs early and pay the early termination penalty. The court pointed out that Treas. Reg. § 1.451-2(a)(2) applied to restrict the constructive receipt of interest income only in cases of CDs of duration of one year or less and forfeiture of three months of interest. The taxpayer failed to identify the CD terms or amounts of penalty applied; therefore, the accrued interest on the CDs at the end of each year was taxable income for each year. The court also assessed the I.R.C. § 6662 accuracy-related penalty because the taxpayer failed to seek any tax advice before omitting \$73,625 of \$126,676 of interest income. **Alonim v. Comm'r, T.C. Memo. 2010-190.**

INVESTMENT INCOME. The taxpayers, husband and wife, timely filed a joint return which was prepared and reviewed by tax professionals. The taxpayers' return included Form 4952, Investment Interest Expense Deduction, on which they elected to treat all net capital gains attributable to the sale of real property as investment income. In an audit, the IRS determined that the property was not investment property and that the taxpayers were not entitled to any investment expenses incurred in connection with the property. The taxpayers sought permission to revoke their election to treat the gain on the sale of the property as investment income. The IRS allowed the taxpayers to revoke the election. **Ltr. Rul. 201034001, May 13, 2010.**

During a tax year, the taxpayer had net capital gains from the disposition of property held for investment and had disallowed investment interest from prior years carried forward to the same tax year. An accountant prepared the taxpayer's income tax return but did not advise taxpayer to make the election under I.R.C. § 163(d)(4)(B) to treat net capital gain from the disposition of the property as investment income and the taxpayer was not aware of the election. The IRS granted the taxpayer an extension of time to make the election. **Ltr. Rul. 201033026, May 7, 2010.**

PASSIVE ACTIVITY LOSSES. The taxpayers, husband and wife, were in a real property business as defined by I.R.C. § 469 and were qualified under I.R.C. § 469(c)(7)(B) to make an election to treat all interests in their rental real estate properties as a single rental real estate activity. However, the taxpayers inadvertently filed their joint return without the statement required under Treas. Reg. § 1.469-9(g)(3). The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201033015, May 12, 2010.**

PARTNERSHIPS.

CHECK-THE-BOX ELECTION. The taxpayer was the sole owner of a limited liability company and did not make the election

to be taxed as a corporation. The business was assessed for federal employment taxes and the taxpayer was assessed personally for the taxes because the business was treated as sole proprietorship because of the disregarded entity rules. The taxpayer challenged the “check-the-box” election regulations as exceeding the IRS statutory authority and as violating the separate entity status of an LLC under state law. The court upheld the election regulations as a reasonable interpretation of the statute. See *Littriello v. United States*, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,426 (6th Cir. 2007). **Britton v. Comm’r**, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,584 (1st Cir. 2010), *aff’g*, 132 T.C. 125 (2009).

PENALTIES. The taxpayer had failed to file income tax returns since 1994 and made several Tax Court filings and numerous appeals, all of which included frivolous and meritless tax protestor claims. The taxpayer had been fined several smaller penalties in the previous cases and the court found that the taxpayer’s actions amounted to merely an attempt to delay the proceedings. The court assessed the maximum penalty of \$25,000 for failure to timely file income tax returns. **Wheeler v. Comm’r**, T.C. Memo. 2010-188.

PENSION PLANS. The taxpayer was employed with a state agency and participated in the state pension plan. The taxpayer borrowed money from the plan in each year from 1998 through 2004. At first the loans were repaid through payroll deductions but the taxpayer stopped making payments after the taxpayer’s employment was suspended without pay. After the taxpayer had failed to make any payments for seven months in 2005, the state deemed the loans to be a distribution and issued Forms 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. for each of two existing loans. The taxpayer included the loans in income for 2005, but did not pay the 10-percent penalty for early withdrawals. The court held that the deemed distribution did not qualify for any of the exceptions under I.R.C. § 72(t)(2)(A); therefore, the distribution was subject to the additional 10 percent tax. **Owusu v. Comm’r**, T.C. Memo. 2010-186.

S CORPORATIONS

ELECTION. The taxpayers, husband and wife, formed a corporation to own and operate a bookstore. The taxpayers claimed losses from an S corporation on Schedule E of their Form 1040. However, the IRS had no record of a filing of Form 2553 electing to have the corporation taxed as an S corporation, a Form 1120S for the corporation or Schedules K-1 as shareholders of an S corporation. The court disallowed the losses for failure of the taxpayers to show that an S corporation election was properly filed. **Ward v. United States**, 2010-2 U.S. Tax Cas. (CCH) ¶ 50,575 (S.D. Texas 2010).

TRAVEL EXPENSES. The taxpayer was a pipe fitter who lived in Bakersfield, CA. When work became scarce in Bakersfield, the taxpayer obtained work at projects in San Francisco, about five hours away. Although each project was temporary, the taxpayer continued to be assigned to other projects around the San Francisco area by the same company for several years, even when work became available in Bakersfield. The court held that the travel, living and meal expenses associated with the projects in San

Francisco were not deductible because the employment there was held to be indefinite. **Deltoro v. Comm’r**, T.C. Summary Op. 2010-123.

PRODUCTS LIABILITY

PRE-EMPTION. The plaintiffs were blueberry farmers who applied the defendant manufacturer’s pesticide to their crops which caused alleged damage. The defendant sought summary judgment under the theory that the negligence for failure to warn claims were pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act. The plaintiffs alleged that advertising brochures distributed by the defendant failed to mention certain ingredients in the pesticide which were known to harm blueberry plants. The court held that summary judgment for the defendant was not appropriate because the negligence claims based on the representations on the written brochures were not pre-empted by FIFRA since enforcement of the claims would not require alteration of the pesticide label. **Indian Brand Farms, Inc. v. Novartis Crop Protection, Inc.**, 2010 U.S. App. LEXIS 16496 (3d Cir. 2010), *rev’g and rem’g*, 2007 U.S. Dist. LEXIS 94443 (D. N.J. 2007).

SECURED TRANSACTIONS

PRIORITY. One defendant pastured cattle owned by a limited liability company, another defendant, under an agreement paying the defendant \$1.10 per day per animal. The LLC owed the defendant \$15,934 in unpaid pasture rent and was owned by the defendant son and daughter-in-law. The pasture agreement started in 2005. In 2006 the LLC borrowed money from the plaintiff and pledged the cattle pastured on the defendant’s land as collateral. When the LLC defaulted on the loan, the plaintiff sought possession of the cattle from the defendant who refused, arguing that the defendant had a statutory possessory lien on the cattle for the unpaid pasture rent. Under Wis. Stat. § 409.333(2), possessory liens have priority over other prior perfected security interests. The plaintiff argued that the defendant’s asserted lien, under Wis. Stat. § 779.43(3), was not possessory because, although possession was required for creation of the lien, the continuation of the lien did not require possession since the lienholder had the discretion to retain or release the cattle. The court held that this option did not change the nature of the lien as possessory because the lien did not arise and could not be enforced without possession of the cattle. The plaintiff also argued that the family relationship between the defendant and the members of the LLC removed the pasture rent agreement from the ordinary course of business status required by Wis. Stat. § 409.333(1). The court held that the mere familial relationship of the parties was not sufficient in itself to remove the agreement from the ordinary course of business status, without additional facts and circumstances showing that the agreement contained provisions not usually found and enforced in such agreements. **Premier Community Bank v. Schuh**, 2010 Wisc. App. LEXIS 622 (Wis. Ct. App. 2010).



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