the employees.[25] If the employee is required to pay for the utilities without reimbursement from the employer, the utilities are not excludable from income.[26]

**Supporting resolution**. If it is intended for the requirements to be met for employees to exclude the fair rental value of a corporate-owned residence from income, it is advisable for the corporation's board of directors to adopt a resolution requiring corporate employees to reside on the premises.[27]

## FOOTNOTES

1 See generally 7 Harl, **Agricultural Law** § 57.03[2] (1990).
2 I.R.C. § 163(h)(2)(D).
3 I.R.C. § 164(a)(1).
4 See I.R.C. § 280A(c)(1).
5 See I.R.C. § 280A(a).
6 I.R.C. § 280A(a),(c)(1). See Proskauer v. Comm'r, T.C. Memo. 1983-395.
7 See Dean v. Comm'r, 187 F.2d 1019 (3d Cir. 1951) (value taxed as additional compensation).
8 I.R.C. § 119.
9 Peacock v. Comm'r, 256 F.2d 160 (5th Cir. 1958).
10 Crowe v. U.S., 84-1 U.S.Tax Cas. (CCH) ¶ 9327, 4 Cls. Ct. 734 (Ct. Cl. 1984).
11 See I.R.C. § 119.
12 Treas. Reg. § 1.119-1(b).
13 *Id.*
14 Ltr. Rul. 8826001, Oct. 14, 1987.
15 Greene v. Kanne, 38-1 U.S.Tax Cas. (CCH) ¶ 9206 (D. Hawaii 1938); Renton v. Kanne, 38-1 U.S.Tax Cas. (CCH) ¶ 9207 (D. Hawaii 1938).
16 Roberts v. Comm'r, 17 P-H Tax. Ct. Mem. 516 (1948).
17 Peterson v. Comm'r, T.C. Memo. 1966-196.
18 257 F. Supp. 16 (D. Wyo. 1966).
19 *Id.*
20 442 F.2d 606 (9th Cir. 1971).
21 *Id.*
22 T.C. Memo. 1985-174.
23 T.C. Memo. 1985-175.
24 Rev. Rul. 68-579, 1968-2 C.B. 61.
25 See Harrison v. Comm'r, T.C. Memo. 1981-211. But see Vanicek v. Comm'r, 85 T.C. 731 (1985), *acq.*, 1986-1 C.B. 1 (portion of cost of utilities for residence provided by employer not deductible because of lack of evidence by which utility costs could be apportioned between business and personal use.)
26 Turner v. Comm'r, 68 T.C. 48 (1977) (cost of utilities and furnishings purchased by welder for house in which welder required to reside not deductible because utilities and furnishings not provided by employer).
27 For a copy of such a resolution, see 7 Harl, *supra* note 1, App. 51C.

# CASES, REGULATIONS AND STATUTES

## ANTITRUST

**PRICE FIXING.** The plaintiffs were sellers of feeder cattle who sold cattle to the defendant meat packers. As a guide for setting prices to be paid to cattle sellers, the defendants used a publication called the Yellow Sheet which published the previous day's prices. The court relied upon the law of the case established in a similar suit by the plaintiffs against meat retailers who also used the Yellow Sheet to establish prices paid to the meat packers. *In re Beef Industry Antitrust Litigation, 542 F. Supp. 1122 (N.D. Tex. 1982), aff'd 710 F.2d 216 (5th Cir. 1983), cert. denied 465 U.S. 1052 (1984).* Under the first case, the court found that the use of the Yellow Sheet was only one of several factors used to establish meat prices. In the current case, the court held that the plaintiffs produced insufficient evidence of similar pricing by the defendants. The plaintiffs also alleged that the defendants acquired monopoly (one seller) power over boxed beef sales and monopsony (one buyer) power in the fed cattle procurement market. However, the plaintiffs also alleged that the defendants misused their power as oligopsonists (market of dominant buyers). The court held that the plaintiffs produced insufficient evidence of market control by the defendants to support either theory and that the evidence under one theory tended to negate the evidence supporting the other theory. ***In re* Beef Industry Antitrust Litigation, 907 F.2d 510 (5th Cir. 1990), *aff'g* 713 F. Supp. 971 (N.D. Tex. 1989)**.

## BANKRUPTCY

### GENERAL

DISCHARGE. A claim for state employment taxes owed by the debtor on wages earned by employees more than 90 days before the filing of bankruptcy was held dischargeable. ***In re* Pierce, 115 B.R. 523 (Bankr. N.D. Tex. 1990)**.

EXEMPTIONS. The debtor was not allowed to exempt the debtor's interest in an IRA under the Connecticut exemption for "profit sharing, pension, stock bonus, annuity or similar plan." **Matter of Spandorf, 115 B.R. 415 (Bankr. D. Conn. 1990)**.

The debtors were shareholders in a corporation which held title to their residences. The corporation was involuntarily dissolved many years before the debtors filed for bankruptcy and claimed their interests in the residences as exempt. Although the debtors did not take any action to revest title to the residences in themselves, the assets of the corporation revested in the sole shareholder in the corporation by law upon the dissolution; therefore, the debtors owned interests in the residences which were eligible for the exemption. ***In re* Morris, 115 B.R. 626 (Bankr. S.D. Ill. 1990)**.

PREFERENTIAL TRANSFERS. The debtors fed cattle belonging to another person and sold the cattle after the cattle reached a certain weight. The proceeds of the sales were then sent to the owner who returned the amount to be paid for the feeding. The court held that the payment of the sales proceeds within 90 days before the bankruptcy filing were not preferential transfers because the cattle and proceeds never belonged to the debtors. ***In re* Zwagerman, 115 B.R. 540 (Bankr. W.D. Mich. 1990)**.

PROFESSIONAL FEES. A farm management company provided services to the debtors and the debtors' attorney in managing the debtors' farm and formulating the debtors' bankruptcy documents. The company applied to the bankruptcy court for employment as a professional but the application was turned down for lack of specificity. A second application was made but not ruled upon. The company applied for professional fees after the reorganization plan was submitted. The court held that no fees would be awarded because the company failed to obtained court approval for employment before providing the services. In addition, the company was required to pay back to the estate money received from the debtors in partial payment for the services. The court noted the company's long experience with providing services to bankruptcy debtors and the adequate time for acquiring approval for employment as factors for denying the fees in this case. ***In re* Grimes, 115 B.R. 639 (Bankr. D S.D. 1990)**.

TURNOVER. The debtor was a partner in an accounting partnership and owned an interest in a 401(k) plan administered by a plan committee and a trust. After filing for bankruptcy, the debtor declared the interest in the 401(k) plan as exempt and requested payment of the funds from the partnership. The debtor received the funds and used them to pay federal and state taxes and living expenses plus some personal debts incurred after bankruptcy. The bankruptcy trustee filed a petition against the partnership for turnover of the funds in the 401(k) plan as estate property. The partnership argued that it did not have ownership or control over the funds. The court held that the committee and trust set up to manage the plan under the requirements of Section 401 were entities separate from the partnership and held possession and control over the plan funds. Thus, the partnership was not liable for the payment of the funds to the debtor and not required to turn over the funds in the plan. ***In re* Robertson, 115 B.R. 613 (Bankr. N.D. Ill. 1990)**.

## CHAPTER 11

EXECUTORY CONTRACTS. At the date of filing bankruptcy, debtor was a party to a land sales contract for the purchase of undeveloped land. After the filing of bankruptcy, the debtor defaulted on the contract and, within a month after the bankruptcy filing, the seller petitioned for acceptance or rejection of the contract. The court held that the debtor would be allowed 120 days after the bankruptcy filing to assume or reject the contract. The court noted that the bankruptcy code does not place a time limit on acceptance or rejection of executory contracts in Chapter 11 but reasoned that the debtor should have at least the 120 days which are allowed for filing a plan of reorganization. ***In re* Taber Farm Assoc., 115 B.R. 455 (Bankr. S.D. N.Y. 1990)**.

## CHAPTER 12

PLAN. The debtor's Chapter 12 plan determined the claim of the FmHA as secured only as to the value of the collateral less the costs of foreclosure, even though the debtor was to retain possession of the collateral under the plan. The debtor argued that under the Agricultural Credit Act of 1987, the FmHA would be required to restructure the loan according to the fair market value less foreclosure costs. The court held that the provisions of the 1987 Act do not apply to the bankruptcy provisions regarding valuation and under Section 506(a), the value of the collateral is the fair market value, based upon the purpose of the valuation and the proposed use of the property. Therefore, because the debtor will retain and use the property, the value of the property is not to be decreased by any possible foreclosure costs. The plan also provided for a 6.5 percent interest rate on deferred payments, again using an interest rate based upon the debtor's rights under the 1987 Act. The court also rejected this provision and remanded the case for a determination of a market rate of interest. ***In re* Case, 115 B.R. 666 (Bankr. 9th Cir. 1990)**.

## CHAPTER 13

PLAN. The debtors' plan classified a claimed secured by a third deed of trust against the residence as unsecured because the fair market value of the house was exceeded by the amount owed on a debt secured by the first mortgage. The third mortgage holder objected and argued that Section 1322(b)(2) prevented modification of claims secured by the debtors' residence. The court held that Section 1322(b)(2) applies after a determination of whether a claim is secured or not under Section 506(a), and therefore, the classification of the third mortgage as unsecured is not prohibited by Section 1322(b)(2). ***In re* McNair, 115 B.R. 520 (Bankr. E.D. Va. 1990)**.

## FEDERAL TAXATION

ALLOCATION OF PAYMENT OF TAXES. A corporate debtor made a payment for taxes after filing for Chapter 11 and requested the IRS to apply the payment to withholding taxes. The IRS treated the payment as involuntary and applied the payment to nonwithholding taxes due. Within 12 days after the payment, the debtor converted the case to Chapter 7. The court held that because the payment was made improperly after filing of the Chapter 11 petition and so close to conversion to Chapter 7, the payment was not voluntary. The court refused to use any equitable powers resulting from the holding in *In re Energy Resources Co., Inc., 110 S.Ct. 2139 (1990)* (see p. 127 *supra*), because the payments were made improperly, would harm other unsecured creditors, and were made only to decrease the shareholders' liability as persons responsible for payment of the withholding taxes. ***In re* Poleshuk, 115 B.R. 716 (Bankr. M.D. Fla. 1990)**.

AUTOMATIC STAY. After the debtors had filed a petition in bankruptcy in 1981, the IRS made Section 6672 assessments against the debtors for unpaid withholding taxes without first obtaining relief from the automatic stay. For the purposes of the present case, the court assumed that the IRS did not have actual notice of the bankruptcy filing at the time of the assessment. The IRS also filed a claim in the bankruptcy proceeding for the assessed taxes. The debtors were discharged in 1983 but did not receive a discharge from the tax liability. The IRS filed liens for the taxes and in 1987 levied against the debtors' bank account and wages. The court held that the IRS assessment during the bankruptcy case was void *ab initio* and because the IRS did not make any valid assessment until more than six years after the tax liability arose, the IRS levies based on that assessment were illegal and to be refunded to the debtors. The court noted that the IRS had more than 28 months after the discharge of the debtors to make a valid assessment but failed to do so. **Anglemeyer v. U.S., 115 B.R. 510 (D. Md. 1990)**.

The IRS levied against funds held by a bankruptcy trustee which were payable to the taxpayer as attorney's fees under Chapter 13 confirmed plans of unrelated debtors. The trustee argued that the levy violated the automatic stay in the bankruptcy cases. The court held that the levy did not violate the automatic stay because no harm would result to the debtors, creditors or bankruptcy estates from the levy because the property levied against was payable to the taxpayer under confirmed plans. As the dissent noted, the court did not provide any authority for this holding and ignored the plain language of Section 362(a)(3). **Laughlin v. U.S., 90-2 U.S.Tax Cas. (CCH) ¶ 50,459 (8th Cir. 1990)**.

AVOIDABLE LIENS. The debtors sought to avoid a tax lien which secured a dischargeable tax claim against real property. The court held that because the debtors had no equity in the property the tax lien was unsecured and avoidable under Section 506(d). ***In re* Frengel, 115 B.R. 569 (Bankr. N.D. Ohio 1990)**.

# FEDERAL AGRICULTURAL PROGRAMS

**BORROWER'S RIGHTS**. The Small Business Administration has adopted as final regulations implementing the homestead protection provisions of Pub. L. No. 100-233, 101 Stat. 1676 (1988), for farm loans made by the SBA. **55 Fed. Reg. 33890 (Aug. 20, 1990)**.

**COMMUNITY FACILITY LOANS**. The FmHA has adopted as final regulations implementing the grant program for rural community water systems established by the Disaster Assistance Act of 1989. **55 Fed. Reg. 32645 (Aug. 17, 1990)**.

**COTTON**. The ASCS has issued proposed amendments to the cotton warehouse regulations which would allow licensed cotton warehousemen to issue negotiable warehouse receipts for reginned motes and insert certain language relating to liens in the schedule of warehouse charges or tariff. **55 Fed. Reg. 340231 (Aug. 21, 1990)**.

**CROP INSURANCE**. The FCIC has announced its intent to revise the Standard Reinsurance Agreement for the 1992 reinsurance year, pending congressional appropriation of funds for crop insurance. **55 Fed. Reg. 34723 (Aug. 24, 1990)**.

The FCIC has adopted as final amendments to the apple crop insurance regulations to provide that premium reduction gained by insureds through good insuring experience will be extended beyond the 1990 crop year. **55 Fed. Reg. 35555 (Aug. 31, 1990)**.

**MEAT AND POULTRY INSPECTION**. The FSIS has adopted as final amendments to the meat and poultry inspection regulations to permit the use of wheat gluten, tapioca dextrin, whey protein concentrate, and sodium caseinate as binders in various meat and poultry products. **55 Fed. Reg. 34679 (Aug. 24, 1990)**.

**PACKERS AND STOCKYARDS ACT**. The respondent was a meat packer subject to the PSA and failed to pay $9,131.98 for beef trimmings within ten days after the sale. The respondent argued that the penalty assessed, the $5,000 minimum under 7 U.S.C. § 192(b), was too high given the financial difficulties of the respondent, the amount of money not paid and the low income of the respondent. The ALJ held that the statutory minimum was proper because the respondent knew the business was in trouble when the purchase was made, the respondent had three weeks to make the payment before the company was placed under a receiver, and the respondent's sole shareholder had sufficient other income. ***In re* Ampex Meats Corp, 47 Agric. Dec. 1123 (June 1988)**.

**PEANUTS**. The AMS has adopted as final amendments to the incoming and outgoing peanut regulations governing the terms and conditions for indemnification for 1990 crop peanuts. **55 Fed. Reg. 34509 (Aug. 23, 1990)**.

The ASCS has affirmed the preliminary determination of a national poundage quota of 1,560,000 short tons for the 1990-91 marketing year. **55 Fed. Reg. 34035 (Aug. 21, 1990)**.

The CCC has affirmed the preliminary determinations of a national average price support of $631.47 per short ton; a national average support price of $149.75 per short ton and a minimum sales price of $400.00 per short ton for additional peanuts for edible use for export which were pledged as collateral for a price support loan. **55 Fed. Reg. 34036 (Aug. 21, 1990)**.

**PERISHABLE AGRICULTURAL COMMODITIES ACT**. The respondent failed to make timely payments for several shipments of lots of apples for which the respondent acted as broker. The failure to pay was caused in part by a shortage of apples and the resulting increase in prices which substantially decreased the respondent's business in a short time. The respondent suspended business when the results of the shortage became evident, contacted all unpaid suppliers and eventually made full restitution. Therefore, the ALJ treated the case as a "slow pay" case and imposed a 45 day suspension instead of a full 90 day suspension. ***In re* Chinook Marketing Co., Inc., 47 Agric. Dec. 1146 (June 1988)**.

**RURAL ELECTRIFICATION**. The REA has adopted as final amendments to the guaranteed loan regulations to establish policies and procedures relating to the prepayment of loans held by the Federal Financing Bank and guaranteed by the REA. **55 Fed. Reg. 35425 (Aug. 30, 1990)**.

# FEDERAL ESTATE AND GIFT TAX

**CLAIMS AGAINST ESTATE.** In 1958 and 1964 the decedent borrowed a total of $1 million from a bank and pledged stock as security. The stock was also transferred in trust to the decedent's children but the bank retained possession of the stock. In 1970, 1975 and 1985, the decedent's children purchased the promissory notes of the decedent from the bank using the stock as security or as a source of funds to purchase the notes. The children then claimed the promissory notes as claims against the decedent's estate in 1986. The IRS ruled that because the decedent's loans were bona fide arms-length transactions and the purchase of the notes from the bank by the children were bona fide arms-length transactions, the claims against the estate were deductible. **Ltr. Rul. 9032003, April 30, 1990**.

**DISCLAIMERS**. The taxpayer was a defeasible remainder beneficiary of a trust providing life income interests for the settlor's wife and children. The taxpayer was to receive any remaining trust corpus after the last of the life beneficiaries had died. When the last life beneficiary died, the taxpayer disclaimed his interest in the remainder of the trust. The court held that the disclaimer was subject to the time limitations of *Jewett v. Comm'r, 455 U.S. 305 (1982)* even though the disclaimer was made two years before *Jewett* because the issue of retroactive application of *Jewett* was not raised by the taxpayer or IRS. Therefore, the disclaimer was not made within a reasonable time after the taxpayer became aware of the existence of the taxpayer's defeasible remainder interest in the trust. **Ordway v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 60,035 (11th Cir. 1990), *rev'g on point*, 89-1 U.S. Tax Cas. (CCH) ¶ 13,802 (S.D. Fla. 1989)**.

A surviving spouse disclaimed after the death of the decedent the interests of the decedent in property they held as joint tenants. Although the Eighth Circuit Court of Appeals held that the disclaimer was timely made, the case was remanded to determine whether the disclaimer was otherwise qualified. The IRS argued that the surviving spouse could not disclaim the decedent's interest in the jointly held property which the spouse originally owned and had transferred to them as joint tenants. The Tax Court held that the qualification of the disclaimer was to be determined as of the date of the decedent's death at which time the decedent held a joint tenancy interest in the property which passed to the surviving spouse. Therefore, the disclaimer was qualified. **McDonald v. Comm'r, T.C. Memo. 1989-140, *on rem. from* 853 F.2d 1494 (8th Cir. 1988), *rev'g* 89 T.C. 293 (1988)**.

**GENERATION-SKIPPING TRANSFER TAX**. An irrevocable trust for five children of the settlor was established in 1973. The five beneficiaries proposed to split the trust into five trusts with each beneficiary as a sole beneficiary of the trusts. The individual trusts retained the same provisions and powers as the original trust. The IRS ruled that the resulting trusts will be treated as having been created prior to September 25, 1985 and not subject to the GSTT. **Ltr. Rul. 9033016, May 18, 1990**.

Two irrevocable trusts for nine children of the settlor were established in 1968. The nine beneficiaries proposed to split the trusts into nine separate trusts with each beneficiary as a sole beneficiary of the trusts. The individual trusts retained the same provisions and powers as the original trust. The IRS ruled that the resulting trusts will be treated as having been created prior to September 25, 1985 and were not subject to the GSTT. **Ltr. Rul. 9033047, May 22, 1990**.

**INTEREST FREE LOANS**. From 1979 through 1984, the taxpayers made interest free demand loans to several trusts. After the decision in *Dickman v. Comm'r, 465 U.S. 330 (1984)*, The taxpayers filed amended Forms 709 and used the interest rates set forth in Treas. Reg. §§ 25.2512-5(c), 25.2512-9(c) as required by *Rev. Rul. 73-61, 1973-1 C.B. 408*. The IRS argued that *Rev. Proc. 85-46, 1985-2 C.B. 507* applied and assessed a deficiency. The actual yield on the money loaned to the trusts was less than the rates assessed by the IRS. The court held that Rev. Proc. 85-46 was reasonable and was to be applied to the taxpayers' loans. The court noted that *Rev. Rul. 73-61* held that only term loans were complete and susceptible of valuation under the regulations. However, the court held that the new rules of *Rev. Proc. 85-46* superseded any valuation rules in *Rev. Rul. 73-61*. **Cohen v. Comm'r, 90-2 U.S. Tax Cas. (CCH) ¶ 60,034 (7th Cir. 1990), aff'g 92 T.C. 1039 (1989)**.

**LIFE INSURANCE**. The decedent purchased a term life insurance policy on his life, with the surviving spouse as owner and beneficiary. The decedent signed a disclaimer which gifted the premium payments from community property each year. The decedent died in 1980. The court held that under the version of Section 2035 in effect at the decedent's death, one-half of the proceeds of the policy was includible in the decedent's gross estate because the gift of the premium for the last policy year was a transfer "in respect to" a life insurance policy. **Knisley v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 60,037 (9th Cir. 1990), *aff'g* 90-2 U.S. Tax Cas. (CCH) ¶ 60,036 (E.D. Wash. 1988)**.

**MARITAL DEDUCTION**. The decedent bequeathed to a surviving child a one-half interest in a condominium apartment owned by the decedent and the surviving spouse subject to the surviving spouse's "right . . . to occupy it for her lifetime conditioned on her paying the expenses of maintaining it." The IRS ruled that under Missouri law, the bequest did not convey a life estate to the surviving spouse in the interest in the apartment with a power to sell or lease the interest; therefore, the interest was not eligible QTIP. **Ltr. Rul. 9033004, no date given**.

**SPECIAL USE VALUATION**. The decedent had owned a farm for more than eight years before death which was share leased to an unrelated tenant. The decedent and the tenant equally shared expenses and profits and the decedent was involved in management decisions, including which crops to plant. The IRS held that the decedent's interest in the farm qualified for special use valuation because the decedent materially participated in the operation of the farm and the qualified heirs planned to continue the lease arrangement with the same participation. **Ltr. Rul. 9033030, May 21, 1990**.

The decedent's estate tax return indicated that the esate was making a special use valuation election by marking the "yes" box after the question "Do you elect special use valuation?" However, the return did not contain a recapture agreement, Schedule N or a notice of the election. The court held that the estate failed to substantially comply with the requirements in the regulations and the Form 706 instructions to make a valid election. The court also denied application of Section 1421 of the Tax Reform Act of 1986 because the estate had not substantially complied with the election requirements. **Est. of Merwin v. Comm'r, 95 T.C. No. 13 (1990)**.

# FEDERAL INCOME TAXATION

**BAD DEBTS**. The taxpayer loaned money to a daughter which was to be repaid in installments after January 1, 1980 or six months after the daughter left school. The loans did not provide for interest unless the installments were not paid when due and the whole loan was payable upon any default. Some of the money was paid back but the taxpayer made no attempts to collect unpaid or late installments. The IRS ruled that a true debtor-creditor relationship was not established and the debt was not eligible for the bad debt deduction. **Ltr. Rul. 9033036, May 21, 1990**.

**CAPITAL GAIN**. The taxpayers sold real property to a corporation formed by one of the taxpayers to develop the land. The court held that the taxpayers recognized capital gain from the sale because the value of the promissory note received by the taxpayers could be ascertained from the fair market value of the property. **Est. of Hollo v. Comm'r, T.C. Memo. 1990-449**.

**CASUALTY LOSSES**. The taxpayer was not allowed a casualty or theft loss deduction for the loss of a residence and furnishings in an eviction resulting from a legal foreclosure on a defaulted mortgage. **Washington v. Comm'r, T.C. Memo. 1990-386**.

## C CORPORATIONS

ALTERNATIVE MINIMUM TAX. The IRS has issued the final regulations implementing Section 56(f) on computing the alternative minimum tax adjustment for the book income of corporations, effective for tax years beginning after December 31, 1986 and before January 1, 1990. **55 Fed. Reg. 33671 (Aug. 17, 1990), adding Treas. Reg. §§ 1.56-0, 1.56-1**.

**HOBBY LOSSES**. The taxpayers were not allowed to claim deductions in excess of gross income from a horse farm activity where the farm was not operated in a business-like manner and the activity was mostly for the personal pleasure of the taxpayers. **Mills v. Comm'r, T.C. Memo. 1990-432**.

## PARTNERSHIPS

JURISDICTION. Under a final partnership administrative adjustment, the IRS allocated all partnership guaranteed payments to a general partner and several months later assessed penalties for substantial underpayment of taxes based upon the allocation of guaranteed payments in the FPAA. The court held that it did not have jurisdiction to hear the partner's appeal of the penalties based upon the misallocation of the guaranteed payments because the guaranteed payments were partnership items for which the time to file a petition in appeal of the FPAA had expired. Part of the guaranteed payments allocated under the partnership agreement were to be paid to other partners in exchange for management assistance to the taxpayer. The court held that it had jurisdiction to hear the taxpayer's appeal of the disallowance of deductions for the amounts of the guaranteed payments which were made to the other partners under the partnership agreement. **Woody v. Comm'r, 95 T.C. No. 15 (1990)**.

## S CORPORATIONS

BUILT-IN GAINS. A wholly-owned corporation with stock valued at less than $5 million made a S corporation election effective December 1, 1987, and changed to a calendar year effective January 1, 1988. A tax return as an S corporation was filed for

December 1987 and calendar years 1988 and 1989. The corporation now proposes to sell appreciated assets. The IRS ruled that the corporation was a qualified corporation under Section 633(d) and exempt from the built-in gains tax under Section 1374. **Ltr. Rul. 9032035, May 16, 1990**.

DEDUCTIONS. The taxpayers were shareholders of an S corporation which transferred money to another corporation. The shareholders claimed interest deductions for the amounts based on characterization of the transfers as loans on the corporations' books. The court disallowed the deductions because no promissory notes were executed, no maturity date was fixed and the only payment was offset by an equal payment from the other corporation. **Georgia Cold Storage Co. v. U.S. 90-2 U.S. Tax Cas. (CCH) ¶ 50,450 (M.D. Ga. 1990)**.

INADVERTENT TERMINATION. In part satisfaction of indebtedness, a shareholder of an S corporation transferred stock to three trusts. The trustee did not know that the corporation was an S corporation and failed to make elections required by Section 1361(d)(2) until notified by the corporation's accountant who later discovered the omissions. The IRS ruled the termination of S corporation status inadvertent and allowed the trusts to make the required elections and the corporation to maintain its S corporation status. **Ltr. Rul. 9032025, May 15, 1990**.

Although a beneficiary of a trust holding S corporation stock signed a consent to the S corporation election, the trust failed to file the elections required by Section 1361(d)(2). The IRS ruled the termination of S corporation status inadvertent and allowed the trust to make the required elections and the corporation to maintain its S corporation status. **Ltr. Rul. 9032026, May 15, 1990**.

SECOND CLASS OF STOCK. An S corporation provided a deferred compensation and long-term incentive plan for its key employees which allowed the employees to purchase performance units with funds from their annual bonus. The plan agreement provided that the income tax liability of the employee for the performance units would not be as dividends from stock. The IRS ruled that the plan did not create a second class of stock in violation of the corporation's S corporation status. **Ltr. Rul. 9032027, May 15, 1990**.

**SALE OF RESIDENCE**. The taxpayer entered into a sale agreement to purchase improved real estate which the taxpayer had been renting from the seller and which the taxpayer had been using as a principal residence. The taxpayer performed all requirements of the sales agreement but the seller did not make final settlement on the agreement. After the taxpayer filed suit for specific performance under the agreement, the parties reached a settlement in which the taxpayer agreed to vacate the land and remove all improvements in exchange for payments from the sellers. The taxpayer used the settlement proceeds to purchase another residence. The court held that, because under Virginia law the taxpayer was the equitable owner of the land before the settlement, the gain from the court settlement was deferrable upon the purchase of the second residence. **Poague v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 50,448 (E.D. Va. 1990)**.

**SAFE HARBOR INTEREST RATES**

**SEPTEMBER 1990**

| | Annual | Semi-annual | Quarterly | Monthly |
|---|---|---|---|---|
| **Short-term** | | | | |
| AFR | 8.08 | 7.92 | 7.84 | 7.79 |
| 110%AFR | 8.90 | 8.71 | 8.62 | 8.56 |
| 120%AFR | 9.73 | 9.50 | 9.39 | 9.32 |
| **Mid-term** | | | | |
| AFR | 8.53 | 8.36 | 8.27 | 8.22 |
| 110%AFR | 9.41 | 9.20 | 9.10 | 9.03 |
| 120%AFR | 10.28 | 10.03 | 9.91 | 9.83 |
| **Long-term** | | | | |
| AFR | 8.74 | 8.56 | 8.47 | 8.41 |
| 110%AFR | 9.64 | 9.42 | 9.31 | 9.24 |
| 120%AFR | 10.53 | 10.27 | 10.14 | 10.06 |

# NUISANCE

**APIARY**. The land owned by the defendants was used as a vegetable farm when the land and the land surrounding it were zoned for residential use only. Fourteen years later, the defendants established an apiary on the land. The court held that the establishment of an apiary was a change in the nature of the farming use and was a nonconforming use under the zoning ordinance and therefore a nuisance per se. The defendants argued that the Michigan right-to-farm law, Mich. Stat. § 12.122(1) *et seq.*, exempted the farm from a nuisance claim. The court held that the right-to-farm statute did not apply to the defendants' farm because the apiary did not exist until after the time of the change in the neighboring land resulting from the zoning change. **Jerome Township v. Melchi, 457 N.W.2d 52 (Mich. Ct. App. 1990)**.

**CHICKEN FARM**. The defendant started a chicken operation two years after the plaintiffs moved on to neighboring land and established a residence. The plaintiffs filed a nuisance action claiming loss of value to their property from the odors from a pit used to dispose of dead chickens and the spreading of chicken waste on the defendant's fields. The court held that the trial court should have submitted to the jury the issue of damage to the value of the plaintiffs' land to the extent of the loss of fair market value resulting from the defendant's chicken operation. In addition, the court held that the trial court improperly applied the right-to-farm statute, Ala. Code § 6-5-127(a), because the chicken operation was begun after the plaintiffs established their residence. **Swedenberg v. Phillips, 562 So.2d 170 (Ala. 1990)**.

# PARTNERSHIPS

**PARTNERSHIP PROPERTY**. The parties to this action were partners in a farm partnership. The partnership farmed land to which title was held in the name of one of the partners and his spouse. The court held that the farm was partnership property because the land was acquired for the partnership, the acquiring partner was reimbursed for the purchase price from partnership income, and the partners intended the land to be partnership property. The plaintiff was expelled from the partnership, causing its dissolution in 1981, but the defendant continued the partnership business until the partnership terminated as a business in 1988. The court held that the plaintiff was entitled to the value of his partnership interest as of the date of dissolution and not one-half of the land upon termination. The value of the land had decreased after the dissolution but the court held that under Tex. Civ. Stat. art. 6132b, § 42, the continuing partner was at risk for any post-dissolution loss and the expelled partner was entitled to the value of the partnership interest at the date of dissolution. The court also held that the plaintiff was entitled to post-dissolution interest on the value of the partnership interest up to the date of judgment in the case. **King v. Evans, 791 S.W.2d 531 (Tex. Ct. App. 1990)**.

# SECURED TRANSACTIONS

**CONSIGNMENTS**. The debtors had operated a feedlot for cattle they owned for several years before agreeing to feed cattle owned by another person. The other person shipped cattle to the debtors' feedlot and the debtors sold the cattle after the cattle reached a certain weight. The proceeds of the sales were to be sent to the other person who would then tender to the debtor the amount owed for the feeding. The debtors did not keep records of the sales of each animal but treated the sales on the FIFO method of accounting. The cattle were commingled with the debtors' own cattle and not separately identified. In obtaining a loan, the debtor granted the creditor a security interest on the debtors' cattle. on the date of bankruptcy filing, the debtor had insufficient cattle to meet the number of cattle which belonged to the other person. The creditor and the other person claimed a priority interest in the cattle. Under U.C.C. § 2-236, goods delivered on approval are not subject to the security interests of creditors of the buyer but goods delivered for sale or return, including consignments or other reservations of title, are subject to the security interests of the creditors of the buyer. The court held that section 2-236 did not apply to the cattle feeding contract because the cattle were not delivered on approval or for resale but for feeding. The sales were made by the original owner but with the debtors as agents to transact the sales. The court also held that cattle purchased by the debtors with the proceeds of the sales of the other person's cattle belonged to the other person under a constructive trust. ***In re* Zwagerman, 115 B.R. 540 (Bankr. W.D. Mich. 1990)**.

**CONVERSION**. The debtor granted the plaintiff a security interest in crops and proceeds. The debtor sold the crop to the defendant who paid half of the proceeds to the debtor and applied the other half to amounts owed by the debtor to the defendant. The plaintiff then sued the defendant for conversion based upon the security interest in the crops. The debtor filed Chapter 12 bankruptcy and the debtor and plaintiff reached a settlement of all claims by the plaintiff against the debtor. The settlement, however, reserved the plaintiff's rights to pursue the defendant for conversion. The court held that the settlement of all claims by the plaintiff against the debtor released the defendant from any claim for conversion of the collateral securing those claims. **Farmers State Bank v. Easton Elev., 457 N.W.2d 763 (Minn. Ct. App. 1990)**.

**PRIORITY.** A creditor's perfected security interests in the debtor's accounts receivable which arose within 46 days after a federal tax lien was filed against the debtor's accounts receivable held priority over the federal tax liens. ***In re* May Reporting Services, Inc., 115 B.R. 652 (Bankr. D. S.D. 1990)**.

The plaintiffs loaned money to the debtors and perfected a security interest in livestock purchased by the debtors with the money. The debtors later borrowed money from the defendant who perfected a security interest in all livestock owned by the debtors, including after-acquired livestock. On the defendant's security agreement, the defendant had noted that the security interest was junior to the plaintiffs' security interest in the debtor's livestock. However, the plaintiffs' security interest lapsed and became junior to the defendant's security interest when the plaintiffs failed to file a timely continuation statement. The plaintiffs argued that their security interest retained priority because the notation on the defendant's security agreement was either a subordination agreement or a waiver. The court held that the notation was not a subordination agreement or a waiver of priority because the defendant's security interest was already junior to the plaintiffs' at the time the notation was made; therefore, the defendant had nothing to subordinate or waive. The court also rejected the plaintiffs' equitable estoppel argument because none of the elements of that claim was shown. **Folkers v. Britt, 457 N.W.2d 578 (Iowa 1990)**.

**PURCHASE MONEY SECURITY INTEREST**. The debtor purchased 100 cows from his parents. The cows were part of the parents' herd the debtor had moved to his farm because his father could no longer take care of them. The purchase agreement was signed on April 6 and granted the parents a purchase money security interest in the cows as security for four annual payments for the cows. The security interest was not filed until April 30. Under the purchase agreement, the debtor could choose 100 cows from the existing herd and any new calves. The selection process was completed by June. The debtor had also granted a security interest in all livestock to a creditor which was perfected as of the date the purchase agreement was signed. The court held that the purchase money security interest was not entitled to super priority over the creditor's perfected security interest in the cows because the purchase money security interest was not filed within 10 days after the debtor gained possession of the cows as required under Idaho Code § 28-9-312(4). The court rejected the parents' argument that possession was not complete until the 100 cows had been selected in June. **Valley Bank v. Est. of Rainsdon, 793 P.2d 1257 (Idaho Ct. App. 1990)**.

**REPLEVIN**. After default of the plaintiff on several loans secured by the plaintiff's farm machinery and livestock, the defendant brought an action in replevin to recover possession of the collateral and was granted possession of the collateral which was eventually sold. The plaintiff alleged that the replevin action was improper because the collateral was taken prior to final judgment on the loans, the sheriff failed to file a report required by statute and the defendant sold the collateral before final judgment on the loans. The court held that the prejudgment taking of the collateral was proper in that the defendant proved a perfected security interest in the collateral, the default of the plaintiff and the value of the collateral. The court also held that the misconduct of the sheriff did not invalidate the replevin but was only a punishable offense. The court held that the prejudgment sale of the collateral was not improper but only made the defendant liable for the proceeds if the judgment on the loans was equal to or greater than the proceeds. In addition, the court reversed a summary judgment against the plaintiff on the issue of the commercial reasonableness of the sale of the collateral, holding that issues of material fact remained. **Mushitz v. First Bank of South Dakota, 457 N.W.2d 849 (S.D. 1990)**.

# STATE TAXATION

**GRAIN ELEVATOR.** A grain elevator was assessed state personal property tax on grain stored in the elevator but owned by others. The elevator did not file a Form 103-N containing the names of the persons owning the grain stored in the elevator until after an audit. The tax assessed was then decreased by the amount of taxes paid by owners of the grain located in the county where the elevator was located. The records of other counties were not searched. The elevator argued that it should not have been assessed for the grain owned by others outside of the county because it filed the Form 103-N. The court held that because the elevator did not file a timely Form 103-N, the elevator could be assessed for grain owned by persons outside of the county except to the extent the elevator provides evidence that taxes were paid on the grain by those owners. **Board of Tax Comm'rs v. Jewell Grain Co., 556 N.E.2d 920 (Ind. 1990), *rev'g* 524 N.E.2d 49 (Ind. Tax 1988)**.

# JOURNAL ARTICLES

**JOURNAL OF AGRICULTURAL TAXATION & LAW,** Fall 1990:

Grossman and Tanner, "The Farm Tenant's Right to the Away-Going Crop: A Review of the Doctrine of Emblements," p. 195.

Hamilton, Adjusting Farm Tenancy Practices to Support Sustainable Agriculture," p. 226.

Duft and Frasier, Computing the Correct Discount Rate for Deferred Payments Under Chapter 12 of the Bankruptcy Code," p. 253.

Nixon, Richardson and Cochran, "The Impact of Changing Tax Laws on Different-Sized Farming Operations," p. 268.