FOOTNOTES

1 I.R.C. § 446. See generally 7 Harl, Agricultural Law § 54.05 (1992).

2 Ltr. Rul. 9103001, no date given.

3 See R. Shisler Farms, Inc. v. Comm'r, T.C. Memo. 1974-141.

4 I.R.C. § 447.

5 Ltr. Rul. 8406003, Oct. 18, 1983 (corporate subsidiary operating cattle feedlot; parent corporation met family ownership test). See Cal-Maine Foods, Inc. v. Comm'r, 93 T.C. 181 (1989) (publicly held farming corporation satisfied family corporation exception; one half of preferred stock had been purchased from unrelated corporation by controlling shareholder with majority subsequently redeemed).

6 I.R.C. § 447(h)(1)(A).

7 I.R.C. § 447(h)(1)(B).

8 I.R.C. § 447(a).

9 I.R.C. § 447(d)(2)(A).

10 *Id.*

11 I.R.C. § 447(i).

12 *Id.*

13 I.R.C. § 447(i)(5)(B). See Ltr. Rul. 8842036, July 26, 1988 (merger of parent chicken processing corporation with subsidiary chicken raising corporation did not cause recapture of parent corporation's suspense account where majority shareholders in both corporations were members of same families); Ltr. Rul. 8909024, Dec. 8, 1988 (gross sales of subsidiary corporation which was not engaged in farming did not affect suspense account for parent farming corporation); Ltr. Rul. 9035027, May 31, 1990 (merger following which remaining entity was family corporation did not result in inclusion of suspense account in income; S corporation election by remaining corporation did not result in inclusion of suspense account, either); Ltr. Rul. 9106009, Nov. 6, 1990, (S corporation election did not cause inclusion in income of suspense account balance; any reduction or recapture of suspense account treated as recognized built-in gain); Ltr. Rul. 9117055, Jan. 30, 1991 (suspense account not recaptured or reduced by proposed merger or by newly merged corporation's S election and new corporation succeeded to suspense account; income during recognition period is built-in gain); Ltr. Rul. 9129008, April 12, 1991 (S corporation election did not require income inclusion; gross receipts for short-year annualized); Ltr. Rul. 9145016, July 31, 1991 (on change in fiscal year, gross receipts annualized for purposes of I.R.C. § 447(i)(3) calculation).

14 Maple Leaf Farms, Inc. v. Comm'r, 64 T.C. 438 (1975) (integrated duck raising and processing operations). See Ltr. Rul. 8936023, June 9, 1989 (gross receipts from feed produced in mill and sold to competitor, gross receipts from other feed sales and gross receipts from management services to unrelated third parties were gross receipts from farming).

15 Ltr. Rul 9009003, Nov. 8, 1989.

16 I.R.C. § 448(b)(1).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

POSSESSION. The plaintiffs sought damages from the defendant for the removal of trees from the plaintiffs' land. The defendant claimed title to the disputed area by adverse possession of over 10 years. The court held that the defendant acquired the disputed land by adverse possession where the defendant paid the mortgages on the property, paid the taxes on the property, marked the boundary line, and cut timber from the property. The plaintiffs argued that the defendant's period of possession was broken by a life estate created in a predecessor owner because the defendant owned only a future interest in the disputed property during the life estate. The court held that once the adverse possession period started, a life estate did not suspend the possession period. **Miller v. Leaird, 413 S.E.2d 841 (S.C. 1992)**.

BANKRUPTCY

GENERAL

AVOIDABLE LIENS. Prior to obtaining a divorce, the debtor and former wife owned the debtor's residence as joint tenants. Under the divorce decree the debtor was awarded the residence in fee subject to a lien in favor of the wife. The debtor claimed the homestead as exempt and attempted to avoid the divorce decree lien as impairing the exemption. The court held that under *Farrey v. Sanderfoot, 111 S. Ct. 1825 (1991)* (see 2 A.L.D. p. 111), the lien was not avoidable because the lien attached prior to or simultaneously with the creation of the debtor's interest in the residence. **Matter of Macke, 136 B.R. 209 (Bankr. S.D. Iowa 1992)**.

ESTATE PROPERTY. In satisfaction of a secured debt to a PCA, the debtor transferred farm land to the PCA in lieu of foreclosure but reserved 120,000 pounds of the peanut quota assigned to the farm land. The debtor attempted to attach the 120,000 pound peanut quota to another farm but the ASCS ruled that because the farm was not in a contiguous county, the poundage quota remained with the deeded farm. The PCA had sold the deeded farm to two other individuals who knew they were not purchasing any part of the reserved 120,000 pound peanut quota. The court held that the 120,000 pound peanut quota remained bankruptcy estate property and ordered the new owners to sell the quota and remit the proceeds to the debtor. **Matter of Williams, 136 B.R. 311 (Bankr. M.D. Ga. 1992)**.

EXEMPTIONS.

ALIMONY. The debtor was not allowed an exemption for an award of alimony because the court held that the award, although termed alimony by the divorce court, was really a lump sum property settlement which was not exempt. ***In re* Benjamin, 136 B.R. 574 (Bankr S.D. Fla. 1992)**.

PENSION PLAN. The court held that the debtor's interest in an ERISA qualified pension plan was excludible from the debtor's estate under ERISA as a federal nonbankruptcy law exemption. The court also held that the debtor's interest in an IRA was not exempt under N.H. Rev. Stat. § 511:21(IV). ***In re* Damast, 136 B.R. 11 (Bankr. D. N.H. 1991)**.

The debtor claimed an exemption in an ERISA qualified pension plan. The court found that the pension plan was reasonably necessary for the debtor's support given the debtor's poor state of health. The trustee failed to file a timely objection but claimed in the untimely objection that the debtor did not have a good faith statutory basis for the exemption; therefore, the exemption should not be allowed. The court held that because the issue of ERISA pre-emption of state exemptions for ERISA qualified pension plans was in conflict, the debtor had a good faith basis for the exemption. In addition, if the exemption was not pre-empted, the debtor was otherwise entitled to the exemption because the court found that the pension plan was reasonably necessary for the support of the debtor. ***In re* Esterlein, 136 B.R. 212 (E.D. Mo. 1992)**.

The debtor claimed an exemption in an interest in a pension plan under La. Stat. § 20:33 or under ERISA as federal nonbankruptcy law exemption. The court held that the exemption would be allowed because the exemption statute was not pre-empted by ERISA. The court also held that ERISA did not provide a federal nonbankruptcy law exemption. **Matter of Arcement, 136 B.R. 425 (Bankr. E.D. La. 1991)**.

WAGES. The debtor claimed an exemption for $2,000 in wages and $953 in federal earned income credit as public welfare benefit. The court held that the earned income credit was property of the estate and was eligible for exemption under Iowa Code § 627.6. The court noted that the trustee failed to present any argument that the federal earned income credit was not a "local" public welfare benefit as required by the exemption statute. The court also held that the debtor was limited by Iowa Code § 627.6 to exempt only $1,000 in wages. **Matter of Davis, 136 B.R. 203 (Bankr. S.D. Iowa 1991)**.

The debtor claimed the livestock raised and crops grown as exempt personal service earnings. No timely objection was made to the exemption. In a decision on avoidance of a lien impairing the claimed exemption in the livestock and crops, the exemption was denied as having no statutory basis. The exemption issue was certified to the Wyoming Supreme Court which held that the claimed exemption was not allowable. The court held that the exemption was not allowed, even without a timely objection, because the debtor had no good faith basis for the exemption. ***In re* Coones, 954 F.2d 596 (10th Cir. 1992)**.

CHAPTER 12

SETOFF. Prior to filing bankruptcy, the debtor was indebted to the CCC for an overpayment of a farm program deficiency payment. The debtor enrolled in the 1990 price support program "Zero-92" under which the debtor received advance payments and would receive additional payments post-petition. The debtor's Chapter 12 plan provided for payment of the overpayment debt but denied the ASCS any right of setoff against the post-petition price support program payments. The debtor argued that the price support program required post-petition performance by the debtor; therefore, the obligation for the post-petition payments would not arise until the debtor's performance was complete. The court held that the price support program agreement was a complete contract pre-petition with mutual promises and not conditions precedent; thus, the payment obligation arose pre-petition and was eligible for setoff against the pre-petition overpayment obligation. ***In re* Lund, 136 B.R. 237 (Bankr. D. N.D. 1990)**.

Prior to filing bankruptcy, the debtor was indebted to the ASCS for the use of cash collateral in a previous bankruptcy case and had enrolled farm land in the conservation reserve program (CRP). The debtor had assumed the CRP contracts in bankruptcy as executory contracts. The ASCS sought to setoff the post-petition CRP payments against the pre-petition cash collateral debt. The court held that the CRP contracts were executory with continuing obligations by both parties which gave rise to payments only after performance was complete; therefore, the CRP payment obligations arose post-petition and could not be setoff against the pre-petition cash collateral debt. ***In re* Gerth, 136 B.R. 241 (Bankr. D. S.D. 1991)**.

FEDERAL TAXATION

AUTOMATIC STAY. After the debtor filed for Chapter 13, the IRS filed a garnishment and a notice of tax lien and attached a refund of the debtor, although the IRS had received several written and oral notices of the bankruptcy case and had filed a claim in the case. The debtor filed a motion for sanctions for violation of the automatic stay. The court held that the IRS had waived immunity for such an action only to the extent of the claims filed by the IRS; therefore, the court awarded the debtor the amount of the claims filed by the IRS plus compensatory damages for the cost of the action. Punitive damages were not allowed. ***In re* Davis, 136 B.R. 414 (E.D. Va. 1992), *aff'g in part and rev'g in part*, 131 B.R. 50 (Bankr. E.D. Va. 1991)**.

The debtors had filed a previous Chapter 11 case, during which the IRS assessed a tax penalty, under I.R.C. § 6672, against the debtors in violation of the automatic stay. However, the debtors did not file an objection to the assessment in that case. The Chapter 11 case was voluntarily dismissed by the debtors and the IRS filed a tax lien for the assessment. The IRS also filed a claim for the assessment in the present case and the debtors objected to the claim as void because of the prior automatic stay violation. The court ruled that the assessment was void, not merely voidable, because it was made during a bankruptcy case in violation of the automatic stay. ***In re* Schwartz, 954 F.2d 569 (9th Cir. 1992), *rev'g*, 119 B.R. 207 (Bankr. 9th Cir. 1990)**.

AVOIDABLE LIENS. The IRS asserted a tax lien against the property of the debtor, including the proceeds of the debtor's homestead which was claimed as an exemption. The debtor sought to avoid the lien as impairing the homestead exemption. The court held that the tax lien was not avoidable. **Davenport v. U.S., 136 B.R. 125 (W.D. Ky. 1991)**.

ESTATE PROPERTY. The IRS levied against the debtor's bank account two days prior to the debtor's filing for bankruptcy. The debtor moved to require the bank to turnover the funds in the account to the bankruptcy estate. The court held that the levied-against funds became estate property upon the filing of the bankruptcy petition and required the bank to turn the funds over to the bankruptcy estate. **Matter of Flynn's Speedy Printing, Inc., 136 B.R. 299 (Bankr. M.D. Fla. 1992)**.

SUBORDINATION. The debtor's Chapter 11 case was converted to Chapter 7 and the Chapter 7 trustee sought to subordinate penalties and interest on federal taxes incurred during the Chapter 11 portion of the case. The court held that administrative costs of the Chapter 7 case received the first priority with administrative costs of the Chapter 11 case receiving second priority. The court allowed the subordination of the tax penalties to other Chapter 11 administrative claims but did not allow the taxes and interest to be subordinated to such claims. ***In re* Import & Mini Car Parts, Ltd., Inc., 136 B.R. 178 (Bankr. N.D. Ind. 1991)**.

CONTRACTS

RESCISSION. The plaintiff purchased an interest in a horse after the seller stated that another buyer would buy the horse from the plaintiff for an additional amount. The purchase price was five times more than the seller paid for the horse. The plaintiff sought rescission of the sales contract after learning that no subsequent buyer existed and that the seller's price for the horse was much lower than the plaintiff paid for the horse. The court allowed rescission because the misrepresentations were material, false and reasonably relied upon by the plaintiff. **Hayes v. Equine Equities, Inc., 239 Neb. 964, 480 N.W.2d 178 (1992)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS. The plaintiff had obtained farm operating loans from the FmHA under the Consolidated Farm and Rural Development Act (CFRDA). After the plaintiff was turned down for additional loans, the plaintiff brought an action alleging that the FmHA failed to comply with the loan regulations. The court held that neither the CFRDA nor its regulations provided a private right of action to enforce its provisions. The court also dismissed the plaintiff's tort claims under the federal Tort Claims Act because the plaintiff had not exhausted all administrative appeals and all of the FmHA actions were discretionary functions not governed by the Tort Claims Act. **Lundstrum v. Lyng, 954 F.2d 1142 (6th Cir. 1991)**.

DISASTER PAYMENTS. The CCC has adopted as final regulations governing the 1990, 1991 and 1992 crop year Disaster Payment Program and Tree Assistance Program. The regulations generally implement the provisions of the FACTA 1990 and the Dire Emergency Supplemental Appropriations Act of 1992 (Pub. L. No. 102-229). **57 Fed. Reg. 10960 (March 31, 1992), amending 7 C.F. R. Part 1477**.

WHEAT. The CCC has issued proposed regulations establishing the acreage reduction for wheat at 15 percent for the 1992 crop, 5 percent for 1993 crop and between 0 and 15 percent for 1994 crop. **57 Fed. Reg. 11588 (April 6, 1992)**.

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION. The decedent had created an inter vivos revocable trust with several individuals and charitable organizations as beneficiaries. At the decedent's death, the trust continued with additional property from the decedent's residuary estate. The court held that the trust was a nonqualifying split interest trust under I.R.C. § 2055(e)(2). In an attempt to have the trust qualify for the charitable deduction, the trustees created a separate trust for the individual beneficiaries. The trustees later obtained a probate court order approving the creation of the second trust. The court held that the creation of the second trust was insufficient to qualify the remaining trust for the charitable deduction because the only reason for the split was to obtain tax reductions. The court also held that the state court order authorizing the second trust was not binding where the IRS had already acquired the right to tax revenue from the trust. **Est. of La Meres v. Comm'r, 98 T.C. No. 24 (1992)**.

The taxpayers established an irrevocable charitable lead trust which provided annual payments of $975,000 with authority for the trustees to make additional payments if the excess payments commuted future payments by the same amount. The trust made several annual excess payments but did not commute future payments by the excess amounts. The court held that the trust was not allowed a deduction for the excess amounts because the amounts were not made pursuant to the trust provisions. **Rebecca K. Crown Income Charitable Fund v. Comm'r, 98 T.C. No. 25 (1992)**.

CLAIMS AGAINST ESTATE. The decedent made several gifts of money to the decedent's children who transferred the money back to the decedent in exchange for a non-interest bearing note payable in 25 years or upon the death of the decedent. The decedent reported the gifts on federal gift tax returns. The court held that the estate could not deduct the notes as claims against the estate because the notes did not represent bona fide debts contracted for full and adequate consideration. **Est. of Flandreau v. Comm'r, T.C. Memo. 1992-173**.

INSTALLMENT PAYMENT OF ESTATE TAX. The decedent had purchased farm land enrolled in the Conservation Reserve Program (CRP) and entered into an agreement with the seller to continue the CRP contract. The decedent was engaged in the active trade or business of farming on other property at the time of death. The IRS ruled that the decedent's estate could include the CRP acres in the decedent's farming business for purposes of qualifying the estate for installment payment of estate taxes under I.R.C. § 6166. **Ltr. Rul. 9212001, June 20, 1991**.

RETURNS. Pursuant to a court order, the trustee sold trust property with resulting capital gain. The court held that the trust was liable for payment of the capital gains tax as part of trust gross income. **Dominion Trust Co. of Tennessee v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,136 (M.D. Tenn. 1991)**.

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayers were required to pay alternative minimum tax (AMT) in taxable years in which the taxpayers had sufficient deductions and credits to produce negative taxable income. In calculating the AMT, the taxpayers deducted the amount of deductions which resulted in no decrease in tax liability, arguing that the tax benefit rule of Section 58(h) (in effect for the taxable years involved) applied to the AMT. The court rejected this argument because the legislative history of TRA 1986 stated that the tax benefit rule was not to apply to the AMT solely to provide relief for the taxpayer because the taxpayer did not receive any benefit from the tax preference item in computing the regular tax. The court also supported its decision by noting that the AMT has several tax benefit provisions already. **Weiser v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,169 (9th Cir. 1992), *aff'g*, 746 F.Supp. 958 (N.D. Calif. 1990)**.

BUSINESS EXPENSES. The IRS ruled that the cost of hiring a tax return preparer to prepare Schedule C was an allowable business deduction and that the cost of services rendered in resolving asserted tax deficiencies relating to business income was also an allowable business deduction. **Rev. Rul. 92-29, I.R.B. 1992-16, 10**.

C CORPORATIONS.

CONSTRUCTIVE DIVIDENDS. The taxpayers controlled a corporation which operated several truck stops. Under the direction of the taxpayers, the truck stop managers transferred cash from vending machines directly to the taxpayers and the income was not reported on the corporate books or income tax returns. The corporation also paid for the construction of homes for the taxpayer's children and claimed deductions for the costs. The court held that the vending machine income and home construction payments were constructive dividends to the taxpayers. **Hagaman v. Comm'r, 92-1 U.S. Tax Cas. (CCH) ¶ 50,141 (6th Cir. 1992), *aff'g*, T.C. Memo. 1987-549**.

MERGER COSTS. The debtor/taxpayer corporation incurred break-up fees in connection with a failed attempt to prevent a hostile takeover of the corporation. The court held that the fees were deductible under I.R.C. § 165(a) as costs incurred in an abandoned transaction and under I.R.C. § 162 as ordinary and necessary business expenses. **Matter of Federated Dept. Stores, Inc., 135 B.R. 950 (Bankr. S.D. Ohio 1992)**.

NET OPERATING LOSSES. The taxpayer/debtor corporation acquired another corporation in order to obtain a group of department stores to add to a national chain of department stores. The debtor operated the new stores for three years and then liquidated the acquired corporation. The stores were operated for three more years before the stores were sold. The debtor made use of net operating losses of the acquired corporation after liquidating the acquired corporation but the IRS disallowed the losses under I.R.C. §§ 269, 382. The court held that the net operating losses would be allowed because the debtor did not have a tax avoidance purpose in acquiring the corporation and continued in the same business as the acquired corporation. **Matter of Federated Dept. Stores, Inc., 135 B.R. 962 (Bankr. S.D. Ohio 1992)**.

COOPERATIVES. An agricultural cooperative entered into an agreement with an independent corporation under which the corporation leased buildings and processing equipment from the cooperative, agreed to process all of the cooperative's commodities produced by the cooperative's members and agreed to pay the cooperative a portion of the profits obtained from the sale of the processed commodities. The cooperative agreed to lend the corporation sufficient operating funds either from the cooperative's own assets or from funds borrowed from a bank for cooperatives. The cooperative provided evidence that the corporation had sufficient funds from other sources for its non-cooperative related business. The IRS ruled that the interest income from the loans to the corporation were patronage sourced income because the loans were a requirement under the agreement. In addition, dividends received from the bank for cooperatives resulting from loans made by the cooperative for funds loaned to the corporation were also patronage sourced. The IRS also ruled that the additional payments from profits from the sales of the cooperative's commodities were patronage sourced income even though the corporation may have used funds from the sales of noncooperative commodities, because the payments were made for the cooperative's commodities. **Ltr. Rul. 9211001, Sept. 23, 1991**.

EMPLOYEE. The taxpayer was an elected member of a district board of supervisors responsible for protection of a state's soil and water resources. The IRS ruled that the taxpayer was an employee with the wages subject to income tax withholding. **Ltr. Rul. 9211046, Dec. 17, 1991**.

EMPLOYEE BENEFITS. In *Rev. Rul. 91-26, 1991-1 C.B. 184*, the IRS had ruled that amounts paid by an S corporation for accident and health insurance covering 2 percent shareholder employees were reportable as wages on Form W-2. The IRS has clarified that ruling to state that the insurance payments are subject to social security and Medicare taxes unless the payments were part of a plan or system for all or a class of employees and their dependents. **Ann. 92-16, I.R.B. 1992-5, 13**.

The IRS has modified *Rev. Proc. 92-6, I.R.B. 1992-1, 105* providing procedures for requesting determination letters on the effect on a plan's qualified status under I.R.C. § 401(a) of plan language that permits the transfer of assets in a defined benefit plan to a health benefits account. **Rev. Proc. 92-24, I.R.B. 1992-13, 22**.

HOBBY LOSSES. The taxpayers were not allowed deductions relating to their horse breeding and racing activities which were held not to be engaged in for profit where the taxpayers both had full time employment elsewhere, devoted little time to the horse activity, did not attempt to improve profitability of the business, did not keep separate bank accounts and kept only informal accounts of the horse activity. **Joubert v. Comm'r, T.C. Memo. 1992-184**.

The taxpayers were not allowed loss deductions from a horse farm because the taxpayers had two years of losses, did not keep separate accounts, and did not consult experts in the horse business. **Easter v. Comm'r, T.C. Memo. 1992-188**.

INNOCENT SPOUSE. The taxpayers, husband and wife, had claimed partnership losses as deductions on their joint income tax return. The IRS disallowed a portion of the partnership losses because the husband was not "at risk" as to that portion of the losses. The wife sought to avoid liability for the resulting deficiency under the innocent spouse doctrine. The IRS agreed that the wife met all of the requirements except that the disallowed losses were not a "grossly erroneous item." The IRS argued that the loss deductions were not grossly erroneous because only a portion of the losses were disallowed. The court held that the disallowed losses were a separate item and were grossly erroneous because the losses clearly related to the husband's investment in the partnership which was not at risk. **Ness v. Comm'r, 954 F.2d 1495 (9th Cir. 1992)**.

INVESTMENT TAX CREDIT. The taxpayers owned farm land which was rented by a partnership for which the taxpayers performed management duties. The taxpayers purchased a grain storage facility and a tractor and entered into written leases leasing the property to the partnership. Although the taxpayers acknowledged that they did not qualify for the noncorporate lessor rules to allow them to claim the investment tax credit on the property, the taxpayers argued that the transaction was not a lease but an informal partnership or joint venture. The court held that the taxpayers failed to overcome the strong presumption of the written documents that the transaction was a lease. **Huestis v. Comm'r, T.C. Memo. 1992-159**.

INVOLUNTARY CONVERSION. The taxpayer made an election under I.R.C. § 1033(a)(2) not to recognize gain from the involuntary conversion of stock. When the taxpayers failed to purchase replacement property within two years, the taxpayers filed an amended return and paid the increased tax resulting from the gain. The IRS assessed interest on the increased tax from the date of the original return. The court held that although I.R.C. § 1033 has no provision for interest, the interest assessment was proper under I.R.C. § 6601(a) which provides for interest on all underpayments of tax. **Suffness v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,149 (N.D. Tex. 1992)**.

IRA'S. The taxpayers owned an IRA in a bank which went into receivership. The taxpayers eventually received the amount in the IRA from the state deposit insurance fund but failed to reinvest the distributed funds in another IRA. The taxpayers argued that the distributed amount should not have been included in their income nor been subject to the early withdrawal penalty because the distribution was from the state deposit insurance fund and not from the IRA. The court held that the source of the funds did not affect the nature of the funds for federal income tax purposes and that the distributed amount was included in gross income and subject to the penalty. **Aronson v. Comm'r, 98 T.C. No. 23 (1992)**.

PARTNERSHIPS

PARTNER'S LIABILITIES. The taxpayer's interest in a partnership was terminated on November 15 of the partnership's calendar tax year. The taxpayer had personally guaranteed a partnership loan and argued that the liability for the partnership debt allowed the taxpayer to claim a share of partnership investment tax credit and other deductions for the entire tax year because the guarantee was not released before the end of the taxable year. The Tax Court had held that, under Florida law, the termination of the taxpayer's partnership interest also terminated the taxpayer's liability for partnership liabilities. The appellate court held that Florida partnership law did not apply to personal obligations of the partner for partnership liabilities. **Weiss v. Comm'r, 92-1 U.S. Tax Cas. (CCH) ¶ 50,168 (11th Cir. 1992), rev'g, T.C. Memo. 1990-492**.

RETIREMENT PLANS. For plans beginning in March 1992 the weighted average is 8.37 percent with the permissible range of 7.53 to 9.20 percent for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 92-9, I.R.B. 1992-14, 62**.

RETURNS. The IRS has issued new Form 8827, Credit for Prior Year Minimum Tax-Corporations, for use by corporations to figure any minimum tax credit for alternative minimum tax incurred in prior years and any minimum tax credit carryforward that may be used in future years. **Ann. 92-9, I.R.B. 1992-3, 36**.

S CORPORATIONS

ADMINISTRATIVE ADJUSTMENTS. The IRS had sent a final S corporation administrative adjustment (FSAA) concerning the corporation's taxable years prior to January 1987 when regulations were promulgated excepting small S corporations from the unified procedures. The shareholders argued that the small partnership exception applied to small S corporations before the regulations were promulgated. The court held that I.R.C. § 6241 pre-empted application of the small partnership exception by providing no exception for S corporations unless and until regulations were promulgated. **Beard v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,175 (N.D. Ala. 1992)**.

ELIGIBILITY. The taxpayer was a trust company authorized under state law to act in a fiduciary capacity but not authorized to accept deposits or make loans. The IRS ruled that the taxpayer was eligible to elect S corporation status because the taxpayer would not be allowed, under I.R.C. § 585, to use a reserve for bad debts. **Ltr. Rul. 9212022, Dec. 20, 1991**.

INADVERTENT TERMINATION. The IRS waived as inadvertent, the termination of the taxpayer's S corporation status resulting from the transfer of a shareholder's stock to trusts for the shareholder's grandchildren, without the timely filing of QSST elections because of an error by the accountant for the corporation. **Ltr. Rul. 9212028, Dec. 24, 1991**.

TRUSTS. The decedent was the sole beneficiary of a testamentary trust and had made a QSST election concerning S corporation stock held by the trust. At the decedent's death, the trust corpus was to pass to three equal remainder holders but the executor delayed distribution of the trust property pending an estate tax closing letter. The IRS ruled that during the existence of the trust during administration of the estate, the remainder holders essentially owned three interests in the trust which did not have to make QSST elections because the remainder holders were considered successive beneficiaries. **Ltr. Rul. 9212031, Dec. 24, 1991**.

SELF-CANCELLING INSTALLMENT NOTES. The decedent had sold blocks of stock to the decedent's children in exchange for 20 year notes which were "canceled and extinguished as though paid" upon the decedent's death. The court held that the cancelation of the notes at the decedent's death was a disposition of the installment obligation and the remaining gain was realized by the decedent and reportable on the decedent's last individual tax return. Five judges dissented, arguing that the death of the decedent did not cancel the obligations under the notes because at the death of the decedent no further obligations arose. **Est. of Frane v. Comm'r, 98 T.C. No. 26 (1992)**.

STRADDLES. The taxpayers were commodities brokers who participated in commodity straddles with the purpose of incurring first year losses and second year capital gains to take advantage of the lesser capital gains tax rate. The taxpayers stipulated that the sole purpose of the transactions was to reap the tax benefits but the taxpayers argued that Section 108 of the Deficit Reduction Act of 1984 as amended by the Tax Reform Act of 1986, provided a presumption that losses incurred by commodities brokers in the trading of commodities were trade or business losses. The IRS had disallowed the losses because the transactions were shams with only a tax avoidance purpose. The court held that the Section 108 presumption did not apply to commodity trades which were sham transactions with only a tax avoidance purpose. **Gardner v. Comm'r, 954 F.2d 836 (2d Cir. 1992)**.

TRUSTS. The decedent established an inter vivos irrevocable trust for two adult children with remainders held by the decedent's grandchildren. The trust provided that the grandchildren had the right to withdraw up to $10,000 from the trust within 15 days after a contribution by the grantor. The court found that there was no agreement between the grantor, the trustee and the beneficiaries that the grandchildren would not make such withdrawals. The decedent made several annual contributions to the trust and claimed the $10,000 annual exclusion for gift tax purposes. The court held that the right of withdrawal made the contributions gifts of present interests eligible for the annual exclusion amount. The IRS has acquiesced to the result. **Est. of Cristofani v. Comm'r, 97 T.C. 74 (1991), acq., I.R.B. 1992-12, 4**.

MORTGAGES

FAILURE OF CONSIDERATION. The defendants borrowed money from and gave a mortgage to the plaintiff in order to purchase a farm which was the subject of a title controversy involving the seller and a third party. The third party eventually prevailed and the defendants lost any right or title to the farm and stopped making payments on the mortgage loan to the plaintiff. In defense of the plaintiff's action for the loan amount, the defendants argued that the loan was invalid for partial failure of consideration because the plaintiff failed to insure that the defendants had full title to the farm. The court held that the defendants warranted in the mortgage agreement that the defendants had marketable title to the mortgaged property and that any failure of title was the defendant's fault. **Federal Land Bank of Omaha v. Woods, 480 N.W.2d 61 (Iowa 1992)**.

PRODUCTS LIABILITY

AUGER/PTO. The plaintiff was injured by a power take off (PTO) on an auger manufactured by the defendant. The plaintiff's breach of warranty action was dismissed by the trial court because of the running of the four year statute of limitations under N.D. Cent. Code § 41-02-104. The plaintiff argued that the six year statute of limitations of N.D. Cent. Code § 28-01-16(1) applied. The appellate court held that the four year limitation applied to breach of warranty actions involving transactions in goods between parties not in privity. The case also involved several challenges to the jury instructions which were denied. **Spieker v. Westgo, Inc., 479 N.W.2d 837 (N.D. 1992)**.

SECURED TRANSACTIONS

CROPS. The debtors had granted the creditor a security interest in the debtor's crops. The security agreement contained a reference to the financing statement description of the land on which the collateral crops were grown. The debtor argued that the security interest was not perfected because the security agreement itself did not contain the description. The court held that a security agreement could meet the description requirement by reference to the financing statement and that the financing statement description was sufficient even though it described land not belonging to the debtor. ***In re* Coones, 954 F.2d 596 (10th Cir. 1992)**.

PURCHASE MONEY SECURITY INTEREST. In a bankruptcy case, the debtors sought to avoid a nonpurchase money security interest as impairing the debtors' exemption for the proceeds of two trucks used in the debtors' cattle business. The security interest was created when the debtors purchased a third truck and the loans for the first two trucks were combined with the loan for the third truck. The court held that the loan for the third truck was a novation of the previous loans in that additional money was borrowed, additional security was pledged, the interest rate was changed and the debtors' payments were increased. Alternatively, the court held that the purchase money nature of the first two loans was extinguished because at the time of the hearing, the debtors' had either paid or transferred sufficient property to the creditor to pay the principal amounts of the first two loans. ***In re* Hassebroek, 136 B.R. 527 (Bankr. N.D. Iowa 1991)**.

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STATE TAXATION

EGG PRODUCTION FACILITY. The plaintiff owned and operated an integrated egg production facility which consisted of several buildings, cages, automated feeding and manure removal systems and egg handling equipment. The county assessor assessed all of the facility as real property. The plaintiff argued that the cages and other equipment were eligible for the exception for attached machinery, under Iowa Code § 427A.1(3), which ordinarily would be removed when the owner moved to another location. The court held that the egg production equipment was easily movable and needed to be moveable given the risks involved in the egg production industry; therefore, the equipment was not taxable as real property. **Rose Acre Farms v. Board of Review, 479 N.W.2d 260 (Iowa 1991)**.

EXCISE TAX. Maine imposed an excise tax on handling in Maine of packaged milk for retail sale in the state. The tax was to be paid by milk dealers at the wholesale level for milk packaged and sold in Maine and paid by retailers for milk packaged outside of Maine. In an advisory opinion, the court held that the tax was constitutional. **Opinion of the Justices, 601 A.2d 610 (Me. 1991)**.

CITATION UPDATES

Peterson Farms I v. Madigan, 782 F.Supp. 1 (D. D.C. 1991) (administrative review jurisdiction), see p. 28 *supra*.

Solomon, Inc. v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,142 (S.D. N.Y. 1992) also published as **Salomon, Inc. v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,155 (S.D. N.Y. 1992)** (investment tax credit) see p. 61 *supra*.

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