In the event the amount of debt securities given up is less than the principal value of debt securities received, the excess amount is boot and is recognized as capital gain.[12] Gain on the exchange is recognized but not in excess of the difference between the principal amount of debt securities surrendered and the principal amount of debt securities received.[13]

Taxpayers participating in a "type E" reorganization must keep records and file specified information with the appropriate income tax returns.[14]

FOOTNOTES

1 Omnibus Budget Reconciliation Act of 1989, Sec. 7203, amending I.R.C. § 351(a), (b), (d), (g).

2 See generally 7 Harl, *Agricultural Law* § 52.03 (1997); Harl, *Agricultural Law Manual* § 7.02 [2][b][ii] (1997).

3 Treas. Reg. § 1.358-2(b). See Rev. Rul. 85-164, 1985-2, C.B. 117 (aggregate basis of property transferred to corporation must be allocated between stock and securities received in proportion to relative fair market values of each class).

4 See I.R.C. § 1367(a).

5 OBRA 1989, Sec. 7203, amending I.R.C. § 351(a), (b), (d), (g).

6 1977-2 C.B. 311.

7 I.R.C. § 368(a)(1)(E). See Commissioner v. Neustadt's Trust, 131 F.2d 528 (2d Cir. 1942), *nonacq*., 1941-1 C.B. 17, nonacq. withdrawn, acq., 1951-1 C.B. 2. See 8 Harl, *Agricultural Law* § 59.07[3][b][v] (1997); Harl, *Agricultural Law Manual* § 7.02[6][c][ii] (1997).

8 Rev. Rul. 77-415, 1977-2 C.B. 311.

9 *Id*.

10 See I.R.C. § 1232.

11 Rev. Rul. 77-415, 1977-2 C.B. 311.

12 I.R.C. § 356(d)(2)(B).

13 See I.R.C. § 354(a)(2)(A).

14 See Treas. Reg. § 1.368-3. For a checklist of information to be included in a request for a ruling relating to the recapitalization of a corporation in a type E reorganization, see Rev. Proc. 81-60, 1981-2 C.B. 680.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

POSSESSION. The dividing line between the parties' properties was originally established in 1866; however, a survey in 1895 erroneously set a stake at a corner 200 feet onto the plaintiff's property. The error was not discovered until a 1993 survey and the parties each sued for establishment of the true property line, based on adverse possession. The parties stipulated at trial that the 1866 survey was correct and the 1895 marker was misplaced. Within two years before the suit, the plaintiff purchased the property from a family member of the defendant who had farmed the land with the defendant for many years before the sale. The court held that the plaintiff failed to demonstrate adverse possession because the plaintiff had not owned the land for at least 10 years and the plaintiff's predecessor in interest had used the land permissively with the defendant. Similarly, the defendant could not claim title by adverse possession because the defendant used the disputed land with permission of the rightful owner. The boundary was moved back to the original position under the stipulation of the parties. **Kraft v. Metternbrink, 559 N.W.2d 503 (Neb. Ct. App. 1997)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXEMPTIONS

AVOIDABLE LIENS. The debtors, husband and wife, each claimed farm implements as exempt under the Wisconsin tools of the trade exemption, Wis. Stat. § 815.18(3)(b), which allowed up to $7,500 in value as exempt. The debtors then sought to avoid nonpossessory, nonpurchase money security interests in the implements. The secured lender, the FSA, objected to allowing any avoidance in excess of $10,000, arguing that Section 522(f)(3) limited the avoidance to the maximum exemption allowed by the federal exemptions. The court held Section 522(f)(3) to be ambiguous as to exemption statutes such as the one in Wisconsin and found that the limitation of Section 522(f)(3) did not apply where the state exemption was not unlimited but was higher than the federal exemption. The court held that the debtors were entitled to avoid the security interest to the full extent of the allowed state exemption amount. ***In re* Ehlen, 207 B.R. 179 (W.D. Wis. 1997), *aff'g*, 202 B.R. 742 (Bankr. W.D. Wis. 1996)**.

CHAPTER 12-*ALM* § 13.03[8].*

TRUSTEE. In order for the debtor to produce a post-petition cotton crop, the trustee obtained Bankruptcy Court authorization for purchase on credit of crop production supplies from a supplier. The supplier was granted a security interest in the cotton crop, but the security interest was made subordinate to other secured creditors. The trustee received payments for the cotton in four checks, with the amounts of the first three checks paid to the priority secured creditors. Upon receiving the fourth check, the trustee paid the supplier in full;

however, the fourth check was not honored by the bank on which it was drawn. The trustee sought to recover the payment to the supplier under theories of statutory restitution, mistake and equitable recovery. The court denied the trustee's request, holding that, because the obligation to the supplier was bona fide and authorized by the court, payment of the debt was not a mistake for purposes of the restitution statute or bankruptcy law. ***In re* Dowden, 207 B.R. 514 (W.D. La. 1997)**.

CHAPTER 13-*ALM* § 13.03.*

DISPOSABLE INCOME. The debtor filed for Chapter 7 and claimed workers' compensation benefits as exempt under state exemptions. The trustee sought a dismissal of the case for substantial abuse because the debtor's income, including the workers' compensation benefits, was more than adequate to pay all unsecured credits fully if the case was brought under Chapter 13. The debtor argued that the workers' compensation benefits were not included in disposable income under Chapter 13 because the benefits were exempt. The court held that Section 1325(b)(2) contained no exception for exempt income; therefore, the workers' compensation benefits would be included in the disposable income calculation and the Chapter 7 case would be dismissed. **In re Koch, 109 F.3d 1285 (8th Cir. 1997), aff'g 187 B.R. 664 (D. S.D. 1996)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

AUTOMATIC STAY. The debtor filed for Chapter 13 and the IRS filed a claim for prepetition taxes owed by the debtor. The debtor's plan was confirmed and the plan provided that all of the debtor's property would remain as property of the estate until the case was dismissed or a discharge was granted. During the period of plan payments, the IRS sent letters to the debtor demanding payment of post-petition taxes owed by the debtor and filed a tax levy against the debtor's wages. The court held that the levy and demand letter violated the automatic stay because the wages were estate property. **Matter of Clark, 207 B.R. 559 (Bankr. S.D. Ohio 1997)**.

DISCHARGE. The debtor, an attorney, failed to file income tax returns for several years. The debtor had filed returns while in the military and during school. The IRS filed a motion to have the tax for the non-return years declared nondischargeable. The court held that under *Matter of Bruner, 55 F.3d 195 (5th Cir. 1995)*, the debtor's failure to file income tax returns and pay the taxes, while financially able to, was sufficient to make the taxes nondischargeable under Section 523(a)(1). ***In re* Parker, 207 B.R. 129 (W.D La. 1996), *aff'g*, 196 B.R. 338 (Bankr. W.D. La. 1996)**.

DISMISSAL. The IRS had filed a claim for taxes in the debtors' Chapter 13 case for tax years in which the debtors had not filed income tax returns. The debtors filed objections to the claims and in hearing those objections, the court had ordered the debtors to file the income tax returns, which were necessary to determine the amount and validity of the tax claims. The debtors failed to file the returns and the IRS moved to dismiss the case. The debtors' arguments consisted primarily of tax protestor-type arguments against the authority of the IRS to tax self-employed persons. The court held that dismissal of the case was proper for failure of the debtors to follow the court's order to file the returns. **Vomhof v. United States, 207 B.R. 191 (D. Minn. 1997)**.

SETOFF. The debtor filed a Chapter 13 case on January 12, 1996, and filed the debtor's 1995 income tax return on January 22, 1996, claiming a refund. The IRS refused to pay the refund, holding the refund as a setoff against prior taxes owed by the debtor. The debtor argued that the refund was a post-petition obligation of the IRS which was not subject to setoff against pre-petition obligations of the debtor. The IRS argued that the refund effective date should be the last date of the tax year for which the refund was sought. The Bankruptcy Court cited I.R.C. § 6407 which provided that the allowance date of a refund was the date the IRS first authorizes the scheduling of an overassessment; therefore, the refund obligation could not arise until the debtor filed an income tax return. The IRS argued that allowing the refund effective date to be determined by the filing of the return gave the debtor too much power to manipulate the status of the refund as a post-petition obligation. The Bankruptcy Court noted that the debtor would have this power even with the IRS's refund date because the debtor could have filed the case prior to December 31, 1995 and achieved the same result. The Bankruptcy Court held that the IRS could not set off the refund because the refund was a post-petition obligation. The District Court reversed, holding that the right to the refund arose at the end of the tax year, making the refund a pre-petition asset of the debtor. ***In re* Glenn, 207 B.R. 418 (E.D. Penn. 1997), *rev'g*, 198 B.R. 106 (Bankr. E.D. Penn. 1996)**.

CONTRACTS

NONCONFORMANCE WITH CONTRACT. The plaintiff entered into a contract to sell onion seed to the defendant. Two conditions of the contract were that the seed have at least a 65 percent germination rate and that the seed be able to be cleaned to less than 1 percent inert matter. The plaintiff harvested the seed and delivered it to the defendant who tested the uncleaned seed for germination and the seed tested at 84 percent germination. The defendant then cleaned the seed and re-tested the germination rate which fell to 69 and 67 percent on two samples. The defendant had the seed tested by independent laboratories which reported germination rates ranging from 51 to 80 percent. The defendant informed the plaintiff that the seed was unacceptable and agreed to purchase the seed only if the defendant could find a buyer for the seed. When the defendant could not find a buyer, the seed was returned to the plaintiff. The plaintiff sued for breach of contract. The court found that the industry practice was to test the seed after cleaning; therefore, the defendant's rejection of the seed was not a breach of contract. The court also held that the defendant timely rejected the seed after all the testing. **Graaff v. Bakker Bros. of Idaho, 934 P.2d 1228 (Wash. Ct. App. 1997)**.

CORPORATIONS

VENUE. The plaintiff was a corporation owning and operating a farm in Prairie County, Arkansas and brought suit for breach of contract against the defendant, a cooperative association with a main office in Arkansas County and a branch office in Pulaski County. The suit was brought in Pulaski County. The plaintiff argued that the defendant was a corporation or association with a branch office in that county and, under Ark. Code § 16-60-105 (1987), venue was proper in that county. The defendant argued that it was not a corporation or association but a specific kind of entity, an agricultural cooperative association, to which the general venue statute applied, making venue proper only in the county of the main office. The court held that, because the defendant was governed by general corporation laws, the special venue statute applied to allow venue in the county where the branch office was located. **Two Bros. Farm, Inc. v. Riceland Foods, 940 S.W.2d 889 (Ark. Ct. App. 1997)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS-*ALM* § 11.01[2].* The debtor had defaulted on a loan from a farm credit bank and the bank obtained a foreclosure judgment against the farm land securing the loan. The land was sold at an auction to the bank. The bank made an in-house appraisal of the property and offered the debtor the chance to purchase the property at the appraised amount. The debtor was unable to obtain financing in time to exercise the debtor's right of first refusal and the bank placed the land for sale by sealed bids, with the appraisal amount as the minimum bid. When no bids were received, the bank contacted interested buyers and obtained a contract to buy from one buyer at a much reduced price. The bank then offered the land to the debtor at the reduced price and required the debtor to respond within 30 days and to close the sale within 15 days after the debtor agreed to purchase the land. The debtor agreed to repurchase the land at the lower price but was unable or unwilling to close the deal on time. The bank sought permission from the Bankruptcy Court to complete the sale to the other buyers and the debtor objected that the requirements of the Agricultural Credit Act of 1987 were not met by the bank. The debtor argued that the initial offering price was not correctly determined because the bank did not have an independent appraisal of the property. The Bankruptcy Court held that the Act does not require or prohibit any specific source of the appraisal and that the debtor always had the chance to match any other offer received by the bank so that the fair market value would be used no matter how flawed the original appraisal was. The debtor also objected that the 15 day closing requirement was too short. The Bankruptcy Court held that the 15 day period was sufficient because the debtor had agreed to the 15 day closing without objection and because the debtor's past actions in filing several bankruptcies had delayed the bank's recovery for several years. The District Court upheld the Bankruptcy Court decision but on appeal, the appellate court held that the debtor had no private right of action against the bank under the Act; therefore, the Bankruptcy Court had no authority to rule in the matter in the first place. ***In re* Wagner, 109 F.3d 909 (3d Cir. 1997), *aff'g unrep. D. Ct. aff'g*, 174 B.R. 189 (Bankr. W.D. Pa. 1994)**.

CROP INSURANCE. The FCIC has issued proposed regulations which include the guaranteed tobacco Endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. **62 Fed. Reg. 32544 (June 16, 1997)**.

The FCIC has announced approval for reinsurance and subsidy of the insurance of wheat in selected states and counties under the Crop Revenue Coverage (CRC) plan of insurance for the 1998 crop year. The notice was intended to inform eligible producers and the private insurance industry of the availability of the CRC plan of insurance for wheat and its terms and conditions. **62 Fed. Reg. 32738 (June 17, 1997)**.

PACKERS AND STOCKYARDS ACT. The debtor had purchased poultry products from a supplier and the supplier filed a claim for the unpaid shipments. The supplier sought a superior lien against the debtor's estate, arguing that it had a secured interest in the poultry products under the Packers and Stockyards Act trust created by the sale. The court held that no trust was created because the supplier was not a dealer in live poultry and did not sell the debtor any live poultry. The supplier had argued that the poultry products were purchased originally from live poultry dealers and that the Act extended to the supplier in order to protect these live poultry dealers. The court refused to extend the Act beyond its expressed limitation to live poultry dealers. ***In re* Chi-Mar Foods, Inc., 207 B.R. 594 (Bankr. N.D. Ill. 1997)**.

The plaintiffs agreed by written contract to sell some cattle to the defendants, with payment due on delivery. The cattle were delivered in several shipments and with each shipment the plaintiffs agreed to allow the defendants to pay for the cattle at the end of the calendar year. With the deliveries, the last in October 1993, the defendant gave the plaintiffs a draw slip on the defendant's bank account, dated January 3, 1994. The defendants defaulted on the payment and the defendant's surety deposited funds with the court pending resolution of the dispute. The plaintiff filed a claim with the Packers and Stockyards Act and claimed the deposited funds under the PS&A trust fund provisions. The defendants argued that the PS&A claim was untimely because not made within 30 days of the date payment was due under a written contract. The plaintiff argued that the written draw slips established the payment date

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as January 3, 1994. The court held that the draw slips were insufficient to extend the payment date because the slips were not issued prior to delivery, the date in the original contract that payment was due. **Sutton v. Hansen, 562 N.W.2d 35 (Minn. Ct. App. 1997)**.

TOBACCO. The CCC has adopted as final a determination of the 1997 marketing quota for burley tobacco to be 704.5 million pounds and the 1997 price support level to be 176.0 cents per pound. **62 Fed. Reg. 30229 (June 11, 1997)**.

The FSA has announced the 1997-98 marketing penalty for various types of quota tobacco.

Type	Cents per pound
Flue-Cured	138
Burley	144
Fire-Cured (Type 21)	134
Fire-Cured (Types 22 and 23)	168
Dark Air-Cured (Types 35 and 36)	153
Virginia Sun-Cured (Type 37)	134
Cigar Filler and Binder (Types 42-44, 54 and 55)	111

62 Fed. Reg. 32285 (June 13, 1997).

FEDERAL ESTATE AND GIFT TAX

GROSS ESTATE. The decedent received royalty payments from Exxon Corp. for oil extraction. Exxon was sued and ordered to make restitution for overcharges made to customers and Exxon sued the decedent and other royalty holders for repayment of royalties based on the overcharges. The decedent died during the case and the estate claimed a deduction for the full amount sought in the suit. Several months later the case was settled for a lesser amount. The IRS allowed only the smaller amount of the actual settlement payment as a deduction in the gross estate and included in the gross estate the income tax deduction available to the decedent from making the restitution payment to Exxon. The court upheld the IRS determination because the amount of the decedent's restitution liability was uncertain and unenforceable at the time of the decedent's death; therefore, the amount of the deduction could be determined on the basis of post-death occurrences. Similarly, the amount of tax benefit included in the gross estate was determined by post-death events because the decedent was entitled to the tax benefit but the amount was uncertain at the date of death. **Estate of Smith v. Comm'r, 108 T.C. No. 20 (1997)**.

IRA. The taxpayer owned an IRA funded with a rollover of funds from a pension plan. The IRA designated the taxpayer's spouse as beneficiary with two charities listed as remainder beneficiaries. The taxpayer was over the age of 70 1/2 and had been withdrawing at least the required minimum annual withdrawal. At the death of the taxpayer, the spouse planned (1) to make an election under I.R.C. § 4980A(d)(5) to defer any estate tax due with respect to excess retirement accumulations, (2) to designate the two charities as beneficiaries, and (3) to execute a codicil to the spouse's will bequeathing the IRA proceeds to the charities. If the spouse failed to designate the charities as remainder beneficiaries, the IRA proceeds passed to the spouse's estate. Under state law, the estate tax attributable to a decedent's excess retirement accumulations is charged against the person receiving the IRA proceeds. The spouse also planned to amend the will to comply with this state law provision. The IRS ruled that any charitable deduction for passage of the IRA funds to the charities must be decreased by the 15 percent excess retirement accumulation tax. The increase in estate tax would be a deduction against the estate taxes. The IRS also ruled that the portion of proceeds of the IRA which would have been gross income to the taxpayer or spouse, would be income in respect of decedent if the distribution is not made prior to the taxpayer's or spouse's death. **Ltr. Rul. 9723038. March 11, 1997**.

The decedent's estate included two IRAs. Under a trust established by the decedent, the IRAs passed to the surviving spouse. Under the trust provisions, the decedent's share passed to two trusts, a marital trust for the surviving spouse and a family trust for the surviving spouse and heirs. The trust allowed the executor discretion as to how much trust property passed to each testamentary trust. The surviving spouse disclaimed $450,000 in one of the IRAs which then passed to the family trust. The IRS ruled that the disclaimer was effective and that the disclaimed portion of the IRA was not included in the surviving spouse's estate. The IRS also ruled that distributions from the family trust would be calculated based on the surviving spouse's life expectancy. The surviving spouse also rolled over the remaining interest in the IRAs to new IRAs in the surviving spouse's name. The IRS ruled that the transfer of IRA funds was not subject to distribution penalty. **Ltr. Rul. 9723028, March 10, 1997)**.

SPECIAL USE VALUATION-*ALM* § 5.03[2].* The decedent's estate included the fair market value of farm property on the estate tax return but also filed a proper protective election for special use valuation. The IRS audited the return and assessed the estate additional taxes because the fair market value of the farm was much higher than reported. The estate challenged the assessment in the Tax Court and the parties eventually reached a stipulated settlement of the fair market value of the farm property. At no point in the case or negotiations did the estate raise the issue of a special use valuation election. After the settlement was entered with the court, the estate filed an amended return making the special use valuation election. The IRS argued that the election was untimely because it was made more than 60 days after a final determination of the IRS, the date of the assessment. The IRS argued that the estate's challenge to the assessment in the Tax Court and the entering into the agreement waived the option of making the special use valuation election. The court agreed, noting that the estate had several opportunities to preserve its rights to the election in the course of its case and negotiations. **Estate of Kokernot v. Comm'r, 1997 U.S. App. LEXIS 13204 (5th Cir. 1997), *aff'g*, T.C. Memo. 1995-590**.

VALUATION. Within two months prior to the decedent's death, when the decedent was terminally ill, the decedent's interest in farm land was transferred by the decedent to a limited partnership. The partners were the decedent and three heirs, with the decedent owning a 96 percent limited partnership interest. The estate argued that the limited partnership interests were to be valued at a 40 percent discount for lack of marketability. The IRS ruled that the transfers would be ignored for the purpose of valuation of the decedent's estate because the transfers served no purpose other than to attempt to lower the value of the assets. **Ltr. Rul. 9730004, April 3, 1997**.

FEDERAL INCOME TAXATION

BAD DEBT DEDUCTION. The taxpayer entered into a contract to purchase real property. The taxpayer paid a $1,000 deposit. The taxpayer had difficulty in finding financing and failed to inform the seller of a need for an extension, as provided by the sales contract, and the seller retained the deposit. The taxpayer did not believe the deposit was recoverable and did not attempt to collect the deposit. The court held that the $1,000 was not eligible for a bad debt deduction or as a trade or business deduction. **Dilozir v. Comm'r, T.C. Memo. 1997-268**.

The taxpayer was a general partner in a partnership which purchased a hotel, using the proceeds of a loan. The taxpayer was required to provide security for the partnership loan with a certificate of deposit. The partnership sold the building to another person in exchange for a promissory note. The buyer eventually defaulted on the note and the partnership defaulted on its loan, causing the creditor to seize the taxpayer's certificate of deposit in payment of the loan. The partnership sued the buyer and in 1986, the suit was pending. The taxpayer thought that the partnership would not be able to repay the taxpayer for the lost certificate of deposit and claimed the amount of the CD as a bad debt deduction in 1986. However, the partnership did eventually recover a judgment on the note in 1987. The court held that the taxpayer failed to prove that the right to restitution from the partnership was worthless in 1986 and denied the bad debt deduction. The court noted that the willingness of the partnership to continue the suit indicated that the partnership believed that in 1986 some recovery was possible from the suit. **Read v. Comm'r, T.C. Memo. 1997-262**.

BUSINESS EXPENSES. The taxpayer was a real estate agent and claimed deductions for use of an office. The claimed deductions included $5,445 for office expense and $3,521 for rent. The taxpayer claimed that the rent was deducted from the taxpayer's real estate sales commission by the real estate company. The IRS argued that the office expense deduction already included amounts for rent. The court held that only the office expense deduction would be allowed to prevent duplicative deductions. **Dilozir v. Comm'r, T.C. Memo. 1997-268**.

CHARITABLE DEDUCTION. The taxpayers claimed a charitable deduction from the transfer of several parcels of ocean front property to the State of Delaware. The parcels were subject to a quiet title action filed by the state in which the state claimed that the properties were abandoned by the previous record title holder or acquired by adverse possession by the state in 1914, long before the taxpayer purchased any interest in the property. The parties reached an agreement in the case, under which the taxpayer deeded any interest in the properties to the state. The court held that no charitable deduction was allowed for the transfer because the taxpayer did not have clear title to the property prior to the transfer. In the alternative, the court held that if the gift were allowed for a deduction, the properties would have a minimal value for speculation purposes only. **Short v. Comm'r, T.C. Memo. 1997-255**.

EARNED INCOME TAX CREDIT. Legislation has been introduced in the U.S. House of Representatites and the U.S. Senate to exclude gain or loss from the sale of livestock from the calculation of capital gain net income for purposes of the earned income tax credit. See articles by Dr. Harl at pp. 41, 73 *supra*. **S. 775, H.R. 1800, 105th Cong., 1st Sess. (1997)**.

INVESTMENT TAX CREDIT. The taxpayers were general partners in partnerships which operated carwashes. The partnerships claimed investment tax credit for the car washing systems in the buildings as nonstructural property. The IRS denied the credit, arguing that the systems were part of the structures. The court held that the car wash systems were nonstructural property eligible for the investment tax credit, including the plumbing and electrical systems and the cost of installing the equipment. **Schrum v. Comm'r, 97-1 U.S. Tax Cas. (CCH) ¶ 50,473 (4th Cir. 1997). *See also* 33 F.3d 426 (4th Cir. 1994)**.

LIKE-KIND EXCHANGES. The taxpayer had owned an apartment building until the building was destroyed by fire. The taxpayer received insurance payments for the loss and used the proceeds to purchase a motel. The taxpayer actively participated in the management of both businesses. The IRS ruled that the motel was not like-kind property to allow deferment of gain realized from the insurance proceeds recovered from the loss of the apartment building. The IRS characterized the taxpayer's role in the apartment building as that of landlord who was not required to participate in the daily oversight of the use of the apartments. The IRS ruled that this lack of daily involvement was significantly different from the requirements of managing a motel where the rooms would require daily cleaning, rental and washing of linens. **Ltr. Rul. 9723032, March 10, 1997**.

NET OPERATING LOSSES. The IRS has issued a warning that corporation taxpayers are improperly characterizing some net operating losses as specified liability losses in order to take advantage of the longer carryback period for such losses under I.R.C. § 172(b)(1)(C). The IRS has found that some taxpayers have made refund claims based on the specified liability loss where any act giving rise to the liability occurred more than three years before the loss year. The IRS stated that it will issue regulations governing the connection needed between an action and the liability in order to qualify the loss for the specified liability loss provision. **Notice 97-36, I.R.B. 1997-__**.

PENSION PLANS. The taxpayer offered an employee stock option plan (ESOP) and funded the plan with assets from prior profit-sharing and pension plans. The ESOP assets were 99 percent loaned to plan participants who were in default on the loans and had not been paying interest on the loans. The IRS ruled that the ESOP was disqualified because the 99 percent loan rate violated the prudent investor rule in that there were no investment protections such as paid interest or compounding of interest. **Ltr. Rul. 9724001, May 29, 1997**.

TRUSTS. The IRS has issued proposed regulations concerning the definition, under I.R.C. § 7701(a)(30), of a domestic trust. The regulations follow the statute in providing two circumstances under which a trust will be considered a domestic trust: (1) a court in the United States is able to exercise primary supervision over the administration of the trust and (2) one or more United States fiduciaries are authorized to control substantial decisions of the trust. The proposed regulations also provide a safe harbor where (1) the trust has only United States fiduciaries, (2) the trust is administered entirely within the United States, and (3) the trust is not subject to an automatic migration provision. **62 Fed. Reg. 30796 (June 5, 1997)**.

The IRS has issued guidance on the reporting requirements for foreign trusts and foreign gifts as required by 1996 amendments to I.R.C. § 6048. The 1996 amendments require information returns for persons who make transfers to foreign trusts and United States citizens who own foreign trusts. The IRS guidance also includes information for reporting large gifts to United States citizens from foreign persons. **Notice 97-34, I.R.B. 1997-25**.

The IRS has issued proposed regulations governing application of the grantor trust rules to foreign trusts with United States persons as beneficiaries. The proposed regulations provide for taxation of U.S. beneficiaries of amounts distributed by foreign trusts to intermediaries prior to being distributed to the U.S. beneficiary. The proposed regulations remove some foreign trusts from the grantor trust rules in order to allow taxation of the beneficiary for distributions from trusts established by foreign persons. **62 Fed. Reg. 30785 (June 5, 1997)**.

PRODUCTS LIABILITY

HERBICIDE. The plaintiff alleged injury from contact with a herbicide manufactured by the defendant. The plaintiff was exposed to the herbicide while driving a tractor down a road while a state highway crew was spraying roadside weeds with the herbicide. The court found that the plaintiff's claims involved issues dealing with the labeling of the chemical. The court held that the claims involving labeling were pre-empted by FIFRA. **Cuevas v. E.I. DuPont De Nemours & Co., 956 F. Supp. 1306 (S.D. Miss. 1997)**.

TRESPASS

TIMBER TRESPASS. The defendant's pickup truck slid off a highway onto the plaintiff's land, damaging trees and shrubs. The plaintiff also alleged that the defendant entered the land with other equipment to remove the pickup, further damaging and removing trees and shrubs. The plaintiff sued, under Or. Rev. Stat. §§ 105.810 (willful trespass) and 105.815 (casual or involuntary trespass) for timber trespass and willful injury to trees and shrubs. The defendant argued that, because the plaintiff did not allege negligence on the part of the defendant, no recovery could be allowed for casual or involuntary trespass. The court held that the plaintiff's allegation that the damage to the trees and shrubs resulted from the defendant's pickup sliding off the highway was sufficient to plead casual or involuntary trespass. **Wyatt v. Sweitz, 934 P.2d 544 (Or. Ct. App. 1997)**.

CITATION UPDATES

Est. of Millikin v. Comm'r, 106 F.3d 1263 (6th Cir. 1997), *aff'g*, T.C. Memo. 1995-288 (administrative expenses) see p. 44 *supra*..

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