CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

PERMISSIVE USE. The plaintiff held record title to the land, a 4.5 acre strip between the parties' farms. The defendant neighbor claimed title to the land by adverse possession based on mistaken use of the strip by the defendant and the defendant's tenant. However, the tenant had also entered into a lease with the plaintiff in order to avoid loss of the crops on the land. The plaintiff sued to quiet title in 2003 and a default judgment was entered for the plaintiff. However, the defendant entered the disputed land and destroyed the crop as violating the defendant's title by adverse possession. The court held that the defendant failed to demonstrate adverse possession because the double tenancy was evidence of non-exclusive use and the evidence showed that the defendant's past use of the strip was under the permission of the plaintiff's predecessor's in interest. **McCain v. Sulcer, 2006 Ark. App. LEXIS 837 (Ark. Ct. App. 2006)**.

BANKRUPTCY

GENERAL

EXEMPTIONS

LIEN AVOIDANCE. The debtors, husband and wife, had a small farm operation, raising crops on leased land a a small number of various livestock. However, in the year of bankruptcy filing, the debtors owned no farm land, raised no crops, had no livestock and had no farm products in inventory. The debtors admitted that they had not been actively farming for almost nine years before the bankruptcy filing. Although the debtors wanted to begin farming again, they had no idea when they could begin farming operations. Both debtors had off-farm employment. The debtors sought to avoid, under Section 522(f)(1)(B)(ii), liens on farm equipment as exempt tools of the trade. The court held that the debtors were not eligible for the lien avoidance provision because the farm equipment was not used by debtors actively engaged principally in farming. ***In re* Hintzman, 2007 Bankr. LEXIS 17 (Bankr. D. Minn. 2007)**.

CONTRACTS

LIABILITY. The defendant was employed by a limited liability company to manage a farm operation. The defendant executed a sales agreement for services and products for chemical and fertilizer application to the farm. The defendant wrote the name of the LLC as the customer on the sales agreement, checked the box that the LLC owned the farm, listed an LLC member and the defendant as members of the LLC and listed the farm property as owned by the LLC, although the defendant was not a member of the LLC and the LLC did not own the farm. The agreement was signed solely by the defendant and did not indicate that the defendant was signing in a representative capacity for the LLC. The defendant also executed a security agreement and listed the LLC and the defendant as debtors. The security agreement was signed solely by the defendant who did not indicate that the defendant was signing in a representative capacity for the LLC. The trial court entered judgment for the creditor against only the defendant, dismissing the case against the LLC and its members. The court noted that the defendant had a good deal of experience in farm contracts and dealings with corporations, partnerships and LLCs such that the defendant knew about the need to sign in a representative capacity if the real party to the contract was the entity and not the person signing for the entity. The appellate court agreed, holding that any ambiguity resulting from the way a contract is signed is to be interpreted against the party signing. Therefore, if the defendant wanted only the LLC to be held liable for the sales agreement and security agreement, the defendant had to sign the agreements as a representative of the LLC. Although neither court made a specific ruling on the issue, both courts apparently held that the defendant was not a member of the LLC or an agent of the LLC in signing the agreements; therefore, the defendant had no authority to bind the LLC in making the agreements. **J.R. Simplot Co. v. Bosen, 2006 Ida. LEXIS 150 (Idaho 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

DISASTER PROGRAMS. The FSA has adopted as final regulations establishing disaster relief programs for agricultural producers who suffered losses in Hurricanes Dennis, Katrina, Ophelia, Rita and Wilma in Alabama, Florida, Louisiana, Mississippi, North Carolina and Texas. The regulations also provide for grants to states to assist aquaculture producers who suffered losses from the hurricanes. **72 Fed. Reg. 875 (Jan. 9, 2007)**.

EXPORTS. The CCC has announced the availability of funding for the 2007 Technical Assistance for Specialty Crops (TASC) Program. The CCC is soliciting applications from the private sector and from government agencies for participation in the FY 2007 TASC Program. The TASC Program is administered by personnel of the Foreign Agricultural Service. The TASC program is designed to assist U.S. organizations by providing funding for projects that address sanitary, phytosanitary, and

technical barriers that prohibit or threaten the export of U.S. specialty crops. U.S. specialty crops, for the purpose of the TASC Program, are defined to include all cultivated plants, or the products thereof, produced in the U.S., except wheat, feed grains, oilseeds, cotton, rice, peanuts, sugar, and tobacco. **72 Fed. Reg. 1311 (Jan. 11, 2007)**.

The CCC has announced the availability of $2.5 million in funding for the 2007 Quality Samples Program (QSP). The CCC is soliciting applications for participation in the FY 2007 QSP. QSP is administered by personnel of the Foreign Agricultural Service. The QSP is designed to encourage the development and expansion of export markets for U.S. agricultural commodities by assisting U.S. entities in providing commodity samples to potential foreign importers to promote a better understanding and appreciation for the high quality of U.S. agricultural commodities. **72 Fed. Reg. 1309 (Jan. 11, 2007)**.

PRODUCTION FLEXIBILITY PROGRAM. The plaintiff owned farm land which was leased under three leases. The plaintiff claimed a 100 percent interest in the farm land in production flexibility contracts for purposes of the production flexibility program (PFP) payments and market loss assistance (MLA) program payments. Under the first lease, the plaintiff received annual cash rent payments, was responsible for maintenance of the irrigation system and was to receive all government payments. Under the second lease, the plaintiff also received annual cash rent payments and was to receive all government payments. Under the third lease, the plaintiff received annual cash rent payments, was responsible for the purchase and maintenance of a new irrigation system and was to receive all government payments. The plaintiff received PFP and MLA payments for the land covered by the leases, but the FSA sought recovery of the payments due to the plaintiff's ineligibility for the payments because the plaintiff was not at risk for loss from the crop production on the land under lease. The FSA cited 7 C.F.R. § 1412.202(a) which provides that an owner of a farm is eligible to enter into a production flexibility contract only if the owner assumes all or part of the risk of producing a crop on the land. In addition, the FSA cited § 1412.303(a)(5) which provides that a landlord is not eligible for production flexibility contracts if the the land is leased under a cash lease. The plaintiff argued that the leases should control who received the PFP and MLA payments. The court held that the leases could not overcome the regulatory requirements; therefore, the plaintiff could not enter into production flexibility contracts for land subject to cash leases. **Widtfeldt v. Johanns, 2006 U.S. Dist. LEXIS 89465 (D. Neb. 2006)**.

TUBERCULOSIS. The APHIS has adopted as final regulations amending the bovine tuberculosis regulations regarding state and zone classifications by raising the designation of Texas from modified accredited advanced to accredited-free. **72 Fed. Reg. 247 (Jan. 4, 2007)**.

FEDERAL ESTATE AND GIFT TAXATION

IRA. The decedent had owned an IRA. The IRA remainder beneficiary was designated as the decedent's estate, which was an error because the decedent had intended the remainder beneficiary to be a trust. The decedent's estate obtained a court order reforming the IRA to change the remainder beneficiary from the estate to the trust. The trust provided that, on the death of the decedent, distributions were to be made to two charities. The trustee assigned the IRA to the charities in satisfaction of their remainder shares in the trust. The IRS ruled that the IRAs would not be included in the income of the estate but would be income to the charities when the distributions were made. **Ltr. Rul. 200652028, Sept. 13, 2006**.

RETURN. The decedent died on August 21, 2002 and the estate tax return was due on May 21, 2003. The estate filed for an extension of time, to November 21, 2003, to file the return, which was granted by the IRS. The estate did not file any request for an extension of time to pay the estate tax. The estate made a payment of $300,000 on August 23, 2003 but did not file a return until March 22, 2004, four months after the extension expired. The return included a payment for the remaining taxes owed. The IRS assessed penalties for failure to timely file a return and for failure to pay the taxes on time and assessed interest. The taxpayer objected to the amount of the penalties, arguing that the penalty should not have been based on all of the tax due because $300,000 was paid before the expiration of the extension of time to file the tax return. The court held that the $300,000 could be excluded from the tax subject to the penalty only if the amount was paid before the tax was due, which was May 21, 2003, but could not be excluded merely because the tax was paid before the return was due, including extensions. The taxpayer also disputed the date of the filing of the return but did not present evidence to support a date earlier than that presented by the IRS. **Estate of Ridenour v. United States, 2007-1 U.S. Tax Cas. (CCH) ¶ 60,535 (S.D. Ohio 2006)**.

FEDERAL INCOME TAXATION

COOPERATIVES

LIQUIDATING DISTRIBUTIONS. The taxpayer had been a tax-exempt farmers' cooperative, but because of a decrease in the amount of crops grown in the area and the existence of another unrelated cooperative, the taxpayer gradually ceased serving its members and sold its assets. Although the taxpayer continued to receive grain from its members, the grain was shipped to the other cooperative for processing, storage and marketing. The IRS ruled that this change in operation converted the taxpayer from a tax-exempt cooperative to a non-exempt subchapter T cooperative. After the real and personal property

was sold the taxpayer paid its members all retained patronage-sourced amounts and then divided the remaining proceeds among the members based on the amount of grain delivered to the taxpayer before termination. A portion of the real property had been leased to a third party for uses unrelated to the taxpayer's cooperative activities. The IRS ruled that the distribution of the remaining proceeds of the sale of the taxpayer's real and personal property could be excluded from income as patronage-source income. However, the proceeds from the leased land could not be excluded from the taxpayer's taxable income. **Ltr. Rul. 200652003, Sept. 20, 2006**.

DEPENDENTS. The taxpayer was the biological but unmarried father of two children who lived with their biological mother. The taxpayer was required to pay $115 per week for child support for the children. The taxpayer claimed the children as dependents, filed under the head of household status and claimed earned income credit using the children as qualifying children. The court held that the taxpayer could not claim the children as dependents because the mother, as the custodial parent, did not file Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents. The court noted that I.R.C. § 152 applied for parents who were never married as well as divorced parents. The court also denied the taxpayer the filing status of head of household because the children did not live with the taxpayer more than one-half of the year. Similarly, the taxpayer could not use the children to qualify for earned income credit because the children did not live with the taxpayer. **Poehlein v. Comm'r, T.C. Summary Op. 2007-2**.

DISASTER LOSSES. On December 29, 2006, the president determined that certain areas in Illinois are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of record snow, which began on November 30, 2006. **FEMA-3269-EM.** On December 12, 2006, the president determined that certain areas in New York are eligible for assistance from the government under the Act as a result of severe storms and flooding, which began on November 16, 2006. **FEMA-1670-DR.** On December 12, 2006, the president determined that certain areas in Washington are eligible for assistance from the government under the Act as a result of severe storms, flooding and landslides, which began on November 2, 2006. **FEMA-1671-DR.** On December 29, 2006, the president determined that certain areas in Oregon are eligible for assistance from the government under the Act as a result of severe storms, flooding and landslides, which began on November 5, 2006. **FEMA-1672-DR.** On December 29, 2006, the president determined that certain areas in Missouri are eligible for assistance from the government under the Act as a result of severe winter storms, which began on November 30, 2006. **FEMA-1673-DR.** Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2005 returns.

DISCHARGE OF INDEBTEDNESS. The taxpayer owned a limited liability company which borrowed money to purchase real property. The lender later agreed to accept a discounted prepayment of the loan, resulting in discharge of indebtedness income to the taxpayer. The taxpayer sought tax advice on how to avoid recognition of the discharge of indebtedness income. However, the taxpayer did not receive good advice until after the period for filing a timely-filed Form 982 "Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment." The IRS granted the taxpayer an extension of time to file the election. **Ltr. Rul. 200652017, Sept. 29, 2006**.

EMPLOYEE BENEFITS. If an employer provides an employee with a vehicle that is available to the employee for personal use, the value of the personal use must generally be included in the employee's income and wages. *I.R.C. § 61; Treas. Reg. §1.61-21.* For employer-provided passenger automobiles (including trucks and vans) made available to employees for personal use that meet the requirements of Treas. Reg. § 1.61-21(e)(1), generally the value of the personal use may be determined under the vehicle cents-per-mile valuation rule of Treas. Reg. § 1.61-21(e). However, Treas. Reg. § 1.61-21(e)(1)(iii)(A) provides that, for a passenger automobile first made available after 1988 to any employee of the employer for personal use, the value of the personal use may not be determined under the vehicle cents-per-mile valuation rule for a calendar year if the fair market value of the passenger automobile (determined pursuant to Treas. Reg. § 1.61-21(d)(5)(i) through (iv)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit. For employer-provided vehicles available to employees for personal use for an entire year, generally the value of the personal use may be determined under the automobile lease valuation rule of Treas. Reg. § 1.61-21(d). Under this valuation rule, the value of the personal use is the Annual Lease Value. Provided the requirements of Treas. Reg. § 1.61-21(d)(5)(v) are met, an employer with a fleet of 20 or more automobiles may use a fleet-average value for purposes of calculating the Annual Lease Values of the automobiles in the employer's fleet. The fleet-average value is the average of the fair market values of all the automobiles in the fleet. However, Treas. Reg. § 1.61-21(d)(5)(v)(D) provides that for an automobile first made available after 1988 to an employee of the employer for personal use, the value of the personal use may not be determined under the fleet-average valuation rule for a calendar year if the fair market value of the automobile (determined pursuant to Treas. Reg. § 1.61-21(d)(5)(i) through (v)) on the first date the passenger automobile is made available to the employee exceeds a specified dollar limit. The IRS has issued a revenue procedure which provides: (1) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2007 for which the vehicle cents-per-mile valuation rule provided under Treas. Reg. § 1.61-21(e) may be applicable is $15,100 for a passenger automobile and $16,100 for a truck or van; and (2) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2007 for which the fleet-average valuation rule provided under Treas. Reg. § 1.61-21(d) may be applicable is $20,100 for a passenger automobile and $21,100 for a truck or van. **Rev. Proc.**

2007-11, I.R.B. 2007-2, 261.

HYBRID MOTOR VEHICLE CREDIT. The IRS has certified the 2007 Nissan Altima Hybrid as eligible for the alternative motor vehicle credit as a qualified hybrid motor vehicle. The credit amount for the hybrid vehicle certification of the 2007 Nissan Altima Hybrid is $2,350. **IR-2007-8**.

LETTER RULINGS.The IRS has issued its annual list of procedures for issuing letter rulings. **Rev. Proc. 2007-1, I.R.B. 2007-1, 1**.

The IRS has issued its annual list of procedures for furnishing technical advice to District Directors and Chiefs, Appeals Offices. **Rev. Proc. 2007-2, I.R.B. 2007-1, 88**.

The IRS has issued its annual list of tax issues for which the IRS will not give advance rulings or determination letters. **Rev. Proc. 2007-3, I.R.B. 2007-1, 108**.

The IRS has issued its annual list of procedures for issuing letter rulings involving exempt organizations. **Rev. Proc. 2007-4, I.R.B. 2007-1, 118**.

The IRS has issued a revenue procedure which provides guidance for complying with the user fee program of the Internal Revenue Service as it pertains to requests for letter rulings, determination letters, etc., on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division; and requests for administrative scrutiny determinations under Rev. Proc. 93-41, 1993-2 C.B. 536. **Rev. Proc. 2007-8, I.R.B. 2007-1, 230**.

PARTNERSHIPS

CONTRIBUTIONS. The IRS has issued an Industry Director Directive to its field agents that I.R.C. § 118 does not apply to partnerships. Section 118 provides that "in the case of a corporation, gross income does not include any contribution to the capital of the taxpayer." The Directive indicates that the IRS will challenge the use of Section 118 by partnerships. **Industry Director Directive on Section 118 Abuse, LMSB Control No. LMSB-04-1106-106**.

RETURNS. The IRS has announced a new Modernized e-File platform for electronic filing of partnership returns, Form 1065 and Form 1065-B. The new platform uses XML format. In 2007, partnerships may use the existing e-Fill platform or the new platform but in 2008, only the new e-File platform will be accepted. **IR-2007-02**.

PENSION PLANS. For plans beginning in January 2007 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the 30-year Treasury securities rate for this period is 4.68 percent, the corporate bond weighted average is 5.78 percent, and the 90 percent to 100 percent permissible range is 5.21 percent to 5.78 percent. **Notice 2007-12, I.R.B. 2007-5**.

The IRS has issued guidance in the form of questions and answers with respect to certain provisions of the Pension Protection Act of 2006, Pub. L. 109-280, that are effective in 2007 or earlier. The sections of the 2006 Act addressed in this notice, which are primarily related to distributions, are § 303 (relating to interest rate assumptions for lump sum distributions), § 826 (relating to hardship distributions), § 828 (relating to early distributions to public safety employees), § 829 (relating to rollovers for nonspouse beneficiaries), § 845 (relating to distributions to pay for accident or health insurance for public safety officers), § 904 (relating to vesting of nonelective contributions), § 1102 (relating to the notice and consent period for distributions), and § 1201 (relating to distributions from IRAs to charitable organizations). **Notice 2007-7, I.R.B. 2007-5**.

QUALIFIED DEBT INSTRUMENTS. The IRS has announced the 2007 inflation adjusted amounts of debt instruments which qualify for the interest rate limitations under I.R.C. §§ 483 and 1274:

Year of Sale or Exchange	1274A(b) Amount	1274A(c)(2)(A) Amount
2007	$4,800,800	$3,429,100

The $4,800,800 figure is the dividing line for 2007 below which (in terms of seller financing) the minimum interest rate is the lesser of 9 percent or the Applicable Federal Rate. Where the amount of seller financing exceeds the $4,800,800 figure, the imputed rate is 100 percent of the AFR except in cases of sale-leaseback transactions, where the imputed rate is 110 percent of AFR. If the amount of seller financing is $3,429,100 or less (for 2007), both parties may elect to account for the interest under the cash method of accounting. **Rev. Rul. 2007-4, I.R.B. 2007-4**.

REFUNDS. The IRS has adopted as final regulations relating to qualified amended returns that provide the circumstances that end the period within which a taxpayer may file an amended return that constitutes a qualified amended return. The IRS uses qualified amended returns to determine whether an underpayment exists that is potentially subject to the accuracy-related penalty on underpayments. The final regulations provide that the period for filing a qualified amended return is terminated once the IRS has served a John Doe summons on a third party with respect to the taxpayer's tax liability. For taxpayers who have claimed tax benefits from undisclosed listed transactions, the regulations provide that the period for filing a qualified amended return is terminated once the IRS requests information related to the transaction that is required to be included on a list under I.R.C. § 6112 from any person who made a tax statement to or for the benefit of the taxpayer, or any person who gave material aid, assistance, or advice to the taxpayer. The regulations also provide that the date on which published guidance is issued announcing a settlement initiative for a listed transaction in which penalties, in whole or in part, are compromised or waived is an additional date by which a taxpayer must file a qualified amended return. **72 Fed. Reg. 902 (Jan. 9, 2007)**.

S CORPORATIONS

TRUST SHAREHOLDERS. The decedent was the sole beneficiary of a grantor trust which held all of the stock of an S corporation, making the trust a permissible shareholder under I.R.C. § 1361(c)(2)(A)(i). The trust provided that, on the death of the decedent, the trust property was to be used to fund a non-marital trust and/or a marital trust. However, all of the stock was distributed to the marital trust. The surviving spouse had the power to withdraw all of the property from the marital trust after 15 months after the death of the decedent. The

IRS ruled that the trust remained a permissible S corporation shareholder. Under I.R.C. § 1361(c)(2)(A)(ii) the trust continued as a permissible shareholder for two years after the decedent's death. The trust became a grantor trust, with the surviving spouse treated as the trust owner, 15 months after the decedent's death and again became a permissible shareholder under I.R.C. § 1361(c)(2)(A)(i). **Ltr. Rul. 200652006, Sept. 19, 2006**.

SALE OF RESIDENCE. Two unmarried taxpayers purchased a house together for their common residence. One taxpayer became pregnant by another person and the taxpayers decided to move apart. Because neither taxpayer could afford to stay in the original residence, the residence was sold and each taxpayer found a new separate residence. The IRS ruled that the sale of the house was due to an unforeseen circumstance and the taxpayers would be allowed, by Treas. Reg. § 1.121-3(b), to exclude the gain from the sale based on the ratio of the number of days the taxpayer owned the residence over 730 days. **Ltr. Rul. 200652041, Sept. 30, 2005**.

SELF-EMPLOYMENT INCOME. Commerce Clearing House has published a Client Relate Bulletin to assist in identifying taxpayers affected by Notice 2006-108, discussed in Harl, "IRS Noticed on SE Tax for CRP Payments," 18 *Agric. L. Dig*. 1 (2007). **CCH Client Relate Bulletin ¶ 4480**.

THEFT LOSS. The taxpayer lost $78 million in a jewelry fraud scheme. The person who committed the fraud was apprehended and sentenced to jail. The taxpayer sued the thief and, in 1998, the taxpayer's lawyers made an estimate of the expected recovery. The taxpayer claimed a theft loss in 1998 based on the estimated recovery of $20 million. The court held that the theft loss deduction could not be made in 1998 because the legal proceedings had not reached a point such the the amount of recovery could be determined with any reasonable certainty. The court noted that an additional $20 million was recovered in 1999. **Johnson v. United States, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,136 (Fed. Cls. 2006)**.

PROBATE

PRECATORY WILL LANGUAGE. The decedent's estate included a family farm and the decedent's will provided that the decedent's son could purchase the farm from the estate at an appraised value. The will provided that the proceeds of that sale would pass to another son, the executor, and daughter of the decedent. The son objected to the value determined by the executor through several appraisals because the executor asked the appraisers to value the land for residential development. The son pointed to precatory language in the will that the decedent wanted the farm to remain as a farm; therefore, the son argued that the appraisals should have been made solely on the basis of the use of the land as a farm. The trial court agreed with the son and ordered a new appraisal based solely on the use of the land as a farm, noting the conflict of interest in the executor who would personally benefit from a high valuation based on residential development. The appellate court reversed, holding that precatory language of a decedent's desires for future use of estate property cannot be used to force a particular method of appraisal. ***In re* Estate of Schlegel, 2006 Ohio App. LEXIS 6849 (Ohio Ct. App. 2006)**.

PROPERTY

EASEMENT. The The plaintiff owned a farm through which ran a road from a public highway to a private cemetery owned by the defendant. There was no other access to the cemetery. The cemetery had been in existence over 150 years and included soldiers from the Civil War and members of the public had used the road to visit the cemetery occasionally but regularly during the ownership of the property by the defendant's predecessors in interest. The appellate court upheld the trial court's denial of the plaintiff's suit for ejectment, holding the long-term use of the road by the public under permission by the previous owners and the lack of a reasonable alternative access, established a public easement over the road. **Farm Properties Holdings, L.L.C. v. Lower Grassy Creek Cemetery, Inc., 2006 Mo. App. LEXIS 1953 (Mo. Ct. App. 2006)**.

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SELECTED ISSUES IN FARM TAXATION

By Roger A. McEowen

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