[13] Hoffman Homes, Inc. v. EPA, 999 F.2d 256 (7th Cir. 1993) (use of phrase "could affect interstate commerce" in 40 C.F.R. §230.3(s)(3) indicated that regulation covered waters with only potential or minimal connection to interstate commerce).

[14] Solid Waste Agency v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000).

[15] *Id.*

[16] 33 C.F.R. §328.3(a)(3); 51 Fed. Reg. 41217.

[17] Solid Waste Agency, Inc. v. United States Army Corps of Engineers, 998 F. Supp. 946 (N.D. Ill. 1998).

[18] Solid Waste Agency v. United States Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

CONVERSION. The debtor was an agricultural cooperative which filed for Chapter 11. During the case, the debtor liquidated all business assets, terminated all employees and ceased business activities. The debtor did have a pending lawsuit against a former manager for embezzlement. The debtor claimed that if the lawsuit produced the claimed damages, the money would be sufficient for the debtor to restart the business. The debtor did not provide any evidence of the chances of success in the lawsuit or that the claimed damages could be recovered, even if awarded. The court held that the case would be converted to Chapter 7 because of the uncertain future of the debtor and the lack of ongoing business or employees to protect through Chapter 11. ***In re* Orienta Co-op. Ass'n, 256 B.R. 508 (Bankr. W.D. Okla. 2000)**.

FEDERAL TAX-*ALM* § 13.03[7].*

AUTOMATIC STAY. The debtors filed for Chapter 13 in April 1998. The IRS received notice of the filing and filed a claim for unpaid taxes. The debtors filed post-petition amended returns for 1991 through 1996 which claimed no income and requested refund of all taxes. In September 1998, the IRS rejected the amended returns as frivolous and assessed a penalty of $500 for each return. In November 1998, the IRS mailed the debtors a Form 6335 which again claimed the frivolous return penalty. In December 1998, the IRS sent the debtors a Notice of Intent to Levy. After contact from the debtors' attorney, the IRS placed a hold on their account and stopped all collection effort. The court held that the Notice of Intent to Levy was a willful violation of the automatic stay. The debtors claimed emotional distress injury from the IRS actions and the court held that the debtors were entitled to $1000 in damages for emotional distress personal injury. ***In re* Covington, 256 B.R. 463 (Bankr. D. S.C. 2000)**.

DISCHARGE. The IRS has issued a Chief Counsel Notice which states that an I.R.C. § 6404(c) abatement of a taxpayer's tax liability does not require a new assessment in order to increase the tax liability. A Section 6404(c) abatement occurs when the IRS has determined that a properly assessed tax liability has become more costly to collect than the amount of the tax collectable. Section 6404(c) abatements can occur during a bankruptcy case where the debtor has insufficient assets to cover a tax liability secured by a tax lien. However, if the tax is not paid, the tax lien is not extinguished in the bankruptcy case, and if the debtor is later found to have sufficient assets subject to the lien, the IRS ruled that it has the authority to increase the debtor's tax assessment without issuing a new assessment, because the Section 6404(c) abatement does not characterize the original assessment as improper, just financially unreasonable to collect. **CC-2001-014**.

TAX LIEN. The debtor failed to file or pay federal income taxes for several years and the IRS filed a tax lien for its estimation of the taxes owed. The debtor argued that the debtor was not subject to any federal tax because the debtor was a "natural sovereign individual" or "freeman." The court held that the debtor, as a resident citizen of the United States was subject to federal income taxation; therefore, the assessed taxes were sufficient to support the tax lien. ***In re* Lesonik, 256 B.R. 441 (Bankr. W.D. Pa. 2000)**.

CONRACTS

ARBITRATION CLAUSE. The debtor was a farmer and had entered into several hedge-to-arrive contracts with a grain cooperative. The debtor defaulted on three of the contracts and the cooperative demanded damages from the debtor. The contracts contained provisions requiring arbitration before the National Grain & Feed Ass'n (NGFA). The debtor refused to submit to arbitration and the cooperative obtained a state court order forcing arbitration. In the arbitration proceeding the debtor claimed that the contracts were void as illegal off-exchange futures contracts. The arbitrators ruled that the contracts were valid cash forward contracts and awarded damages to the cooperative. The debtor filed for bankruptcy and the cooperative filed a claim for the damage award. In the bankruptcy case, the debtor attempted to attack the validity of the arbitration proceeding as biased because of the predominance of grain dealers on the arbitration panel. The court held that the debtor failed to provide sufficient evidence of bias in the arbitration process. The court also held that the arbitration award was due preclusive effect, barring the Bankruptcy Court from relitigating the validity of the contracts. ***In re* Robinson, 256 B.R. 482 (Bankr. S.D. Ohio 2000)**.

FEDERAL AGRICULTURAL PROGRAMS

APPLES. The CCC has issued final regulations implementing the Apple Market Loss Assistance Payment Program. **66 Fed. Reg. 13839 (March 8, 2001).**

FARM CREDIT SYSTEM. The U.S. Supreme Court held that banks that are part of the Farm Credit System are subject to state income taxation. The court stated that Congress was silent as to whether the banks were subject to state income tax and, accordingly, the banks were subject to state income tax. **Director of Revenue of Missouri v. CoBank ACB, et al., No. 99-1792, 531 U.S. ____ (Feb. 20, 2001)**.

LIVESTOCK INDEMNITY PROGRAM. The CCC has issued proposed regulations implementing the livestock indemnity program for 2000 for losses due to disasters or wild fires in areas covered by a qualifying disaster declaration issued by the President or Secretary of Agriculture. For 2000, losses due to anthrax are also included. **66 Fed. Reg. 13681 (March 7, 2001)**.

LOAN DEFICIENCY PAYMENTS. The CCC has issued final regulations providing for grazing payments in lieu of LDPs for the 2001 crop year for acreage planted to wheat, barley or oats where the producer elects to use the acreage for grazing instead of harvest. **66 Fed. Reg. 13402 (March 6, 2001)**.

PERISHABLE AGRICULTURAL COMMODITES ACT. The plaintiff was held to have violated PACA commercial bribery provisions for making payments to purchasing agents of several produce buyers. The court upheld the Judicial Officer's use of a four part test for commercial bribery: (1) payment or offer of payment to a purchasing agent; (2) the payment or offer was intended to induce the purchasing agent to purchase produce; (3) the payment or offer was more than *de minimis*; and (4) the purchasing agent's employer was not aware of the payment or offer of payment. The court held that there was sufficient evidence to support a finding of the commercial bribery provision of PACA and that the four part test was valid. The court noted that the test still allowed such permissible "benefits" to purchasing agents as dinners, promotional allowances and rebates so long as the purchasing agent's employer is informed about the benefit. **JSG Trading Corp. v. U.S.D.A., 235 F.3d 608 (D.C. Cir. 2001)**.

WOOL AND MOHAIR. The CCC has issued final regulations implementing the Wool and Mohair Market Loss Assistance Payment Program. **66 Fed. Reg. 13839 (March 8, 2001).**

FEDERAL ESTATE AND GIFT TAX

DISCLAIMER. The taxpayer was the nephew of the decedent. The taxpayer held a contingent remainder interest in a trust established by the decedent prior to 1977, although the taxpayer did not learn about the interest until the death of another contingent remainder holder who had become the beneficial interest holder in the trust upon the death of the decedent. At the death of the other contingent remainder holder, a question arose as to whether the taxpayer received an interest in the trust as an heir of the decedent or by a power of appointment exercised by the other contingent interest holder. A settlement was reached which essentially acknowledged that the taxpayer received estate property as an heir of the decedent. The taxpayer then disclaimed a portion of the bequest within nine months after learning about the taxpayer's contingent interest in the trust. The IRS ruled that the disclaimer was timely made. The IRS also held that the taxpayer's efforts to enforce rights under the decedent's trust was not considered an acceptance of the benefits of the interest in the trust. **Ltr. Rul. 200109041, Dec. 4, 2000**.

GIFTS. The decedent formed a partnership with the taxpayer's son, with each transferring property to the partnership in exchange for a corresponding interest in the partnership. The decedent also formed a similar partnership with the decedent's daughters. In each case, the decedent owned a substantial majority of the partnership. The decedent then transferred most of the decedent's interest in the partnerships to the other partners. The decedent valued gifts of the transferred interests at a discount for lack of marketability, minority interests and built-in capital gains. The IRS argued that if the decedent transferred property to the partnership with a value greater than the partnership interest received in return, a gift must have occurred when the property was transferred to the partnership. The court held that, as in *Strangi v. Comm'r, 115 T.C. 478 (2000),* no gift occurred upon transfer of the property to the partnership. However, the value of the gift of the decedent's interest in the partnerships to the other partners was the value of the underlying assets less a 40 percent discount for lack of marketability and lack of control. A discount of an additional eight percent was allowed for possible litigation over forced liquidation. No discount was allowed for the built-in capital gains. **Estate of Jones v. Comm'r, 116 T.C. No. 11 (2001)**.

TAX BENEFIT RULE. The taxpayer established a trust for the taxpayer funded with an inheritance. The decedent's estate was assessed a deficiency which included interest. The interest was paid by the trust which claimed the payment as a deduction on the trust return. Because the trust was a grantor trust, the interest deduction passed to the taxpayer. The IRS later refunded the entire interest payment assessed to the estate and the refund was passed on to the trust. The court held that, because the taxpayer received the tax benefit from the interest deduction, the return of the interest was included in the taxpayer's taxable income. The appellate court affirmed in a decision designated as not for publication. **Hornberger v. Comm'r, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,234 (4th Cir. 2001), *aff'g*, T.C. Memo. 2000-42**.

TRUSTS. The IRS has issued proposed regulations under which qualified revocable trusts can elect to be treated as part of a decedent's estate. The regulations replace the procedures established by *Rev. Proc. 98-13, 1998-1 C.B. 370. 65 Fed. Reg. 79015 (Dec. 18, 2000)*. The IRS has announced that estates and qualifying revocable trusts of decedents who die after December 31, 1999, and before the effective date of the final I.R.C. § 645 regulations, may choose to use either the election and reporting procedures set forth in *Rev. Proc. 98-13*, or the election and

reporting procedures set forth in Prop. Treas. Reg. §§ 1.645-1(c), 1.645-1(d)(1)(i) and (ii)(A). **Notice 2001-26, I.R.B. 2001-__**.

The taxpayer established a trust intended to qualify as a personal residence trust. The taxpayer transferred two parcels of property to the trust. The parcels were contiguous and were used as a personal vacation home. The property included a residence, garage, a one bedroom cabin, a tennis court and a Jacuzzi. The property was not used for commercial purposes and was not used by anyone but the taxpayer and family. A part-time maintenance worker lived in an apartment above the garage when working on the property. A conservation easement prohibited division of the property. The IRS ruled that the property was a personal residence under I.R.C. § 2702(a)(3)(A)(ii). **Ltr. Rul. 200109017, Nov. 27, 2000**.

The taxpayers, husband and wife, established a trust after attending a week-long seminar sponsored by a trust promoter. The taxpayers transferred their home, business and other assets to the trust, although their use of those assets did not change. The taxpayers used a professional tax return preparer but did not give the preparer all information about the trust. The IRS had ruled that the trust was to be disregarded, resulting in the taxpayers being personally liable for income tax, and that the taxpayers were liable for the penalty for the accuracy-related penalty for negligent disregard of the income tax rules and regulations. The taxpayers argued that they were not liable for the penalty because they relied on the professional advice of the income tax preparer. The court held that the taxpayers could not rely on the advice of the preparer because the taxpayers did not give the preparer all the information about the trust and because the taxpayers failed to provide any evidence of the preparer's expertise. **Bowen v. Comm'r, T.C. Memo. 2001-47**.

VALUATION. The decedent had won a state lottery and, at the decedent's death was eligible for 18 annual installment payments of the prize. Although the estate acknowledged that the remaining prize payments were included in the decedent's estate, the estate argued that the installments should be valued under a fair market test. The court held that the installments were an annuity for federal estate tax purposes and had to be valued using the actuarial tables of I.R.C. § 7520. The second part of the holding is contrary to the holding of *Estate of Shackleford v. United States, 99-2 U.S. Tax Cas. (CCH) ¶ 60,356 (E.D. Cal. 1999)*. **Estate of Gribauskas v. Comm'r, 116 T.C. No. 12 (2001)**.

FEDERAL INCOME TAXATION

BUSINESS EXPENSES. The taxpayer claimed deductions for depreciation, legal expenses, and business travel, entertainment and meal expenses. The taxpayer failed to provide full and accurate records of the expenses sufficient to demonstrate the business purpose for each expense; therefore, the court upheld the IRS determination of those deductions. **Burris v. Comm'r, T.C. Memo. 2001-49**.

COURT AWARDS AND SETTLEMENTS. The taxpayer sued an insurance company for fraud, conversion and breach of fiduciary duty. The petition made no claim for personal injury other than to claim that the taxpayer had suffered mental anguish. The parties reached a settlement with no allocation of the payment as to the various claims made in the suit. The court held that the settlement proceeds were included in the taxpayer's income because none of the proceeds were for personal injury claims. **Dickerson v. Comm'r, T.C. Memo. 2001-53**.

The taxpayer sued a former employer for race discrimination in termination of employment. The suit asked only for back pay and attorneys' fees as damages. The parties reached a settlement which characterized the payments as for personal injury to the taxpayer. The court held that the character of the settlement proceeds was determined by the pending claims made in the lawsuit; therefore, the settlement proceeds were for back pay and attorneys' fees and were included in the taxpayer's income. **Banks. v. Comm'r, T.C. Memo. 2001-48**.

DEPRECIATION-*ALM* § 4.03[4].* The IRS has issued tables detailing the (1) limitations on depreciation deductions for owners of passenger automobiles first placed in service during calendar year 2001, including separate limitations on passenger automobiles designed to be propelled primarily by electricity and built by an original equipment manufacturer (electric automobiles); (2) the amounts to be included in income by lessees of passenger automobiles first leased during calendar year 2001, including separate inclusion amounts for electric automobiles; and (3) the maximum allowable value of employer-provided automobiles first made available to employees for personal use in calendar year 2001 for which the vehicle cents-per-mile valuation rule provided under Treas. Reg. § 1.61-21(e) may be applicable.

For automobiles (other than electric automobiles) placed in service in 2001 the depreciation limitations are as follows (the amounts are identical to 2000):

Tax Year	Amount
1st tax year	$3,060
2d tax year	4,900
3d tax year	2,950
Each succeeding year	1,775

For electric automobiles placed in service in 2001 the depreciation limitations are as follows:

Tax Year	Amount
1st tax year	$9,280
2d tax year	14,800
3d tax year	8,850
Each succeeding year	5,325

Rev. Proc. 2001-19, I.R.B. 2001-9, 72.

DISASTER PAYMENTS. The IRS has issued a list of areas which were declared by the President in 2000 to be adversely affected by disasters of sufficient severity and magnitude to warrant assistance by the Federal Government under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, as a result of natural disasters in 2000. Accordingly, a taxpayer who sustained a loss attributable to the disasters may deduct the loss on his or her 1999 federal income tax return. **Rev. Rul. 2001-15, I.R.B. 2001-13**.

On February 23, 2001, the President determined that certain areas in Mississippi were eligible for assistance under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, as a result of a severe storms and tornadoes on February 16, 2001. **FEMA-1360-DR**. On March 1, 2001, the President determined that certain areas in Washington were eligible for

assistance under the Act as a result of an earthquake on February 28, 2001. **FEMA-1361-DR**. Accordingly, a taxpayer who sustained a loss attributable to the disasters may deduct the loss on his or her 2000 federal income tax return.

DISCHARGE OF INDEBTEDNESS. The taxpayer was in the fishing business and purchased a fishing boat using a loan. The taxpayer defaulted on the loan and the boat was sold at a foreclosure sale. The proceeds of the sale were used to pay off most of the loan, with the remainder forgiven by the lender. At the time of the loan forgiveness, the taxpayer was solvent, with most of the taxpayer's assets in a commercial fishing permit. The taxpayer did not include the discharge of indebtedness income from the loan forgiveness in income because of the insolvency exception of I.R.C. § 108(d)(3). The taxpayer argued that assets which would be exempt from the claims of creditors should not be included in calculating the taxpayer's solvency. The taxpayer claimed that the fishing permit was exempt from creditors' claims under Alaska law. The court held that all assets, exempt or not, were to be included in determining a taxpayer's solvency for purposes of discharge of indebtedness income. The court stated that the exempt assets exclusion rule established by *Cole v. Comm'r, 42 B.T.A. 1110 (1940)* was eliminated by Congress by the enactment of I.R.C. § 108. An article by Neil Harl will appear in a future issue of the Digest **Carlson v. Comm'r, 116 T.C. No. __ (2001)**.

The taxpayer had borrowed money from the FmHA (now FSA) for the taxpayer's farming operation and had defaulted on the loans. The FmHA foreclosed against the security for the loans and, in 1990, forgave the remaining indebtedness, giving rise to $32,000 in discharge of indebtedness income. The taxpayer excluded that amount from income under the qualified farm indebtedness exception. The IRS argued that the discharge of indebtedness income was not qualified farm indebtedness because the taxpayer did not have more than 50 percent of income from farming for the three years prior to receiving the discharge of indebtedness income. The taxpayer failed to provide any direct evidence of the taxpayer's farm and nonfarm income; therefore, the court held that the taxpayer was not eligible for the qualified farm indebtedness exception. **Campbell v. Comm'r, T.C. Memo. 2001-51**.

EARNED INCOME CREDIT. The taxpayer had claimed an earned income credit based on self-employment income. The court found that the taxpayer was not employed at a business and received money from the taxpayer's parents for work done in the home. The court held that the taxpayer was not eligible for earned income credit because the taxpayer had no earned income. **Akhter v. Comm'r, T.C. Summary Op. 2001-20**.

The taxpayer was a prison inmate who worked for a private company on a work-release program and received wages for the work. The work was performed outside of the prison but the taxpayer was required to return to prison at the end of each work period. The court held that the taxpayer was barred by I.R.C. § 32(c)(2)(B)(iv) from eligibility for earned income credit while incarcerated. **Tramble-Bey v. Comm'r, T.C. Summary Op. 2001-23**.

EMPLOYEE BENEFITS. The taxpayer was a towboat captain and the taxpayer's employer provided insurance plans for the taxpayer as an employee. The taxpayer made contributions to the insurance plan but not to the long-term disability coverage. The employer paid for the long-term disability coverage with funds which were not included in the taxpayer's wage income; therefore, the taxpayer did not pay any tax on the employer's contributions. The taxpayer suffered a work-related disability and received benefits under the long-term disability plan. The court held that the benefits were included in the taxpayer's income. **Duplantis v. Comm'r, T.C. Summary Op. 2001-24**.

ENVIRONMENTAL CLEANUP COSTS. The taxpayer purchased commercial property which had been used as a dry cleaning business. The previous owners had allowed chemicals to be dumped on the land. The taxpayers continued to use the property for the same business but eventually closed the business and stored remaining chemicals and equipment on the property. The taxpayer was ordered to clean up the contaminated soil several years later. The IRS ruled that, because the land was contaminated when the taxpayer purchased the property, the clean up costs had to be capitalized. **Ltr. Rul. 200108029, Nov. 24, 2000**.

FUEL CREDIT. The taxpayer was a corporation which operated a crop chemical application business. The chemicals were applied using tractors pulling the applicators. The taxpayer filed a claim for a credit for federal tax paid on the fuel used in the tractors but did not obtain formal waivers from its customers. The taxpayer argued that it is entitled to the fuel credit because Form 4136, Credit for Federal Tax Paid on Fuels was properly filled out and none of the customers filed for the credit. The taxpayer also argued that the waivers were not required by the instructions to Form 4136. The court held that the controlling rule was found in Treas. Reg. § 48.6420-4(l)(2) which required the formal waivers; therefore, the taxpayer could not claim the credit without first obtaining the waivers from its customers. **Crop Care Applicators, Inc. v. Comm'r, T.C. Summary Op. 2001-21**.

INTEREST RATE. The IRS has announced that, for the period April 1, 2001 through June 30, 2001, the interest rate paid on tax overpayments is 8 percent (7 percent in the case of a corporation) and for underpayments at 8 percent. The interest rate for underpayments by large corporations is 10 percent. The overpayment rate for the portion of a corporate overpayment exceeding $10,000 is the federal 5.5 percent. **Rev. Rul. 2001-16, I.R.B. 2001-__**.

INVESTMENT TAX CREDIT. The taxpayers owned two corporations, one of which purchased buses which were leased to the other corporation. In 1985, when the ITC was still available, the first corporation purchased seven buses with useful lives of nine years. The buses were leased to the other corporation for 49 months. At the end of that lease, another lease was executed for another 19 months. The court held that the leases were to be aggregated to a total of 68 months, which was more than 50 percent of the useful life of the buses; therefore, the first corporation could not claim ITC for the buses. The second corporation was also barred from ITC because no election was filed to treat the second corporation as the owner of the buses. **Charlson v. Comm'r, T.C. Memo. 2001-52**.

INVOLUNTARY EXCHANGES. The taxpayer owned a commercial building which was used to operate a hardware retail business. The taxpayer also leased a second building for the same purpose. The first building was destroyed by a fire and the taxpayer received insurance proceeds. The lease on the second building had a provision which allowed the taxpayer to purchase the building and the taxpayer used the insurance proceeds plus

additional funds to purchase that building. The first hardware business was terminated but the second business continued in the purchased building. The IRS ruled that the investment of the insurance proceeds in the second building was in sufficiently similar property to qualify for Section 1033 nonrecognition of gain from the transactions. **Ltr. Rul. 200109005, Nov. 20, 2000**.

LIMTED LIABILITY COMPANIES. A corporation decided to convert to a limited liability company and made the election to be classified as an association taxable as a corporation for federal tax purposes. The IRS ruled that the conversion and election would not cause the LLC to be taxed as an entity other than a corporation. **Ltr. Rul. 200109019, Nov. 29, 2000**.

PASSIVE ACTIVITY LOSSES. The taxpayer was a shareholder in two professional corporations, both of which provided accounting services. The taxpayer was also a partner in a partnership which owned a commercial building which was leased to both the corporations which occupied distinct portions of the building. Both leases originated prior to 1988 and had automatic renewal clauses. However, the rent amount in each lease was substantially changed after 1988 and new lease contracts were executed. The court held that the change in the rent amount and execution of new contracts after 1988 subjected the partnership's rent income to the Treas. Reg. § 1.469-2(f)(6) recharacterization rules. The IRS had determined that the two leases constituted one business activity and that the rental income was not passive activity income. The court upheld the IRS determination because the taxpayer failed to demonstrate that the leases were treated as separate business activities and that the partnership did not materially participate in the business. **Kucera v. Comm'r, T.C. Summary Op. 2001-18**.

PENSION PLANS. The IRS has issued a Supplement to Publication 575, Pension and Annuity Income and a Supplement to Publication 590, Individual Retirement Arrangements, which take into account proposed regulations and substantially simplify the calculation of minimum required distributions from qualified plans, individual retirement arrangements and other related retirement savings vehicles. **Ann. 2001-23, I.R.B. 2001-10, 74.**

S CORPORATIONS-*ALM* § 7.02[3][c].*

BUSINESS EXPENSES. The taxpayer was the sole shareholder of an S corporation through which the taxpayer operated a law practice. The taxpayer owned three motorboats which were leased to the corporation for use in entertaining clients. The taxpayer included the rent paid as income and deducted the associated expenses of operating the boats. The S corporation claimed deductions for the lease payments. The lease deductions were disallowed to the corporation because the boats were used for personal and business entertainment. The court held that the taxpayer could not also decrease the amount of rent included in taxable income because the payments came from a separate entity, the S corporation. **Catalano v. Comm'r, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,233 (9th Cir. 2001), *aff'g*, T.C. Memo. 1998-447**.

SHAREHOLDER BASIS. The taxpayers were shareholders of an S corporation who had claimed pass-through loss deductions. The shareholders claimed to have made capital contributions and loans to the corporation which increased their bases in their stock. The taxpayers evidence of capital contributions and loans was only a disorganized collection of checks and business records. The court noted that even if the checks were loans or contributions to the corporation, the taxpayers failed to provide any evidence that the loans were still outstanding at the end of the tax year or that the contributions had not been repaid; therefore, the IRS disallowance of the loss deduction was upheld. **Guerrero v. Comm'r, T.C. Memo. 2001-44**.

SALE OF RESIDENCE. The taxpayer had purchased a New Jersey residence in 1969 and lived there continuously until 1991 when the taxpayer began operating the taxpayer's trucking business in Florida in the winter. The taxpayer maintained the original residence but also used an apartment in an investment property owned by the taxpayer in Florida during the winter. The taxpayer stopped working in New Jersey but returned to the residence each summer. The New Jersey residence was sold in 1996 and the taxpayer excluded the gain from income. The IRS argued that the taxpayer had abandoned the New Jersey home as a principal residence before the sale and was not eligible for the gain exclusion. The court held that the gain was excludible because the taxpayer had demonstrated that the New Jersey home was used as a residence for at least 36 months of the five years before the sale of the property. **Taylor v. Comm'r, T.C. Summary Op. 2001-17**.

THEFT LOSS. The taxpayer was a partnership which claimed a theft loss deduction for 1991 based upon a claim of conversion. The court denied the deduction because the taxpayer did not discover the loss until 1992 and the loss was not shown to be unrecoverable in 1991. The court noted that, in 1991, the taxpayer was still pursuing litigation against the persons who the taxpayer alleged committed the conversion. **Venture Funding, Ltd. v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,240 (E.D. Mich. 2001)**.

TRESPASS

TIMBER The plaintiff owned 18 acres of undeveloped land. The defendant was hired by the neighboring land owner to harvest trees from the neighbor's property; however, the defendant unintentionally .removed trees from the plaintiff's property. The plaintiff sought a jury instruction at trial that the amount of damages included loss for use of the land and for discomfort and annoyance to the land owner. The trial court refused both additions and the appellate court affirmed, holding that the instructions were not allowed because the plaintiff failed to provide any evidence of loss of use of the land or discomfort and annoyance to the plaintiff from the loss of the trees. The court also held that the plaintiff was not entitled to treble damages because the trespass was unintentional. **Hartle v. Nelson, 15 P.3d 484 (Mont. 2000)**.

CITATION UPDATES

McNamara v. Comm'r, 236 F.3d 410 (8th Cir. 2000) (rent as self-employment income) see Harl article p. 9 *supra*.

***In re* Old Fashioned Enterprises, Inc., 236 F.3d 422 (8th Cir. 2001), *rev'g*, 245 B.R. 639 (D. Neb. 2000)** (PACA) see p. 19 *supra*.

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