CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

HOSTILE POSSESSION. The plaintiff and defendant owned adjoining properties. The defendant's property was bisected by a road, with the disputed strip of land on the plaintiff's side of the road. The plaintiff claimed to have harvested some of the trees on the disputed strip as part of harvesting operations of the trees on the plaintiff's property and posted no trespassing signs on some of the trees. The trial court granted title to the disputed strip to the plaintiff based on the existence of the road as a natural boundary between the properties acknowledged by the users of the road. The appellate court reversed, holding that the plaintiff failed to show any open, continuous and hostile use of the disputed property. The court held that the occasional harvesting of trees and sign postings were insufficient activity to transfer title to the plaintiff by adverse possession. **Howe v. Boyle, 2009 Wisc. App. LEXIS 55 (Wis. Ct. App. 2009)**.

ANIMALS

HORSES. The plaintiff participated in a trail ride with the defendant near the defendant's home using the defendant's horse. The plaintiff was injured when the horse bolted after attempting to cross a boggy area. The plaintiff filed a suit in negligence, claiming that the defendant failed to exercise ordinary care in selecting a horse and trail suitable for the plaintiff's riding skill and failing to warn about the existence of bogs on the trail. The trial court granted summary judgment to the defendant under Tex. Civ. Prac. & Rem. Code Ann. § 87.003 which provided immunity from suit for inherent risks in equine activities. The plaintiff appealed, arguing that material issues of fact remained as to whether an exception, Tex. Civ. Prac. & Rem. Code Ann. § 87.004, permitted liability in this case. The exception permitted liability where the horse owner failed to determine the rider's level of experience prior to the equine activity. The evidence was unclear as to whether the defendant made any enquiry as to the plaintiff's riding experience, although the plaintiff was known to have significant breeding experience. The appellate court held that summary judgment was improper because an issue of fact remained as to whether the exception applied because the defendant failed to sufficiently apprise the plaintiff's riding ability for the trail and horse used. **Lee v. Loftin, 2009 Tex. App. LEXIS 645 (Tex. Ct. App. 2009)**.

BANKRUPTCY

FEDERAL TAX

DISCHARGE. The debtor originally filed for Chapter 13 and included secured, unsecured priority and unsecured non-priority claims. The case was converted to Chapter 11 and debtor's confirmed plan provided for full payment of the secured claim and partial payment of the unsecured claims. During the plan, the IRS assessed additional taxes and penalties for the tax years giving rise to the claims filed in the bankruptcy case. The IRS filed a Notice of Lien and Levy to collect the additional taxes and penalties and the debtor sought a determination that the tax claims were discharged. The court held that the tax claims were nondischargeable because the claims were either assessed within 240 days of the bankruptcy filing or the tax returns were due within three years of the bankruptcy petition filing. Therefore, the additional taxes and penalties were nondischargeable and collectible outside the bankruptcy case. ***In re* Newman v. United States, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,237 (Bankr. M.D. Fla. 2008)**.

SALE OF CHAPTER 12 PROPERTY. The debtor had raised corn in 2005 and retained the corn for use as feed for the debtor's cattle. Prior to and after the bankruptcy petition was filed in July 2006, the debtor sold the corn to the debtor's corporation on request from the lender which held a security interest in the corn. The sales produced self-employment income to the debtor and the debtor's plan treated the taxes as a general unsecured claim under Section 1222(a)(2)(A). The debtor and IRS agreed that the taxes were post-petition taxes because the return was filed after the petition. The IRS argued that section 1222(a)(2)(A) did not apply because the corn was not an asset used in the farming operation. The court focused on the fact that the debtor no longer raised crops and used the corn to feed cattle in an on-going farm operation and did not market the corn for public sale. Therefore, the corn held that the proceeds of the corn sale to the debtor's corporation for continued use in the farm operation was eligible for Section 1222(a)(2)(A) treatment. ***In re*** **Uhrenholdt, 2009 Bankr. LEXIS 144 (Bankr. D. Neb. 2009)**.

FEDERAL AGRICULTURAL PROGRAMS

FEDERAL CROP INSURANCE. The FCIC has adopted as final regulations adding crop insurance coverage for cabbage under the Common Crop Insurance Policy Basic Provisions. The regulations convert the cabbage pilot crop insurance program to a permanent insurance program starting with the 2010 crop year. **74 Fed. Reg. 8705 (Feb. 26, 2009).**

The FCIC has adopted as final regulations amending the General Administrative Regulation, Appeal Procedure to incorporate a requirement mandated by the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) that allows producers to use both mediation and the informal administrative appeal process in their appeals of decisions by FCIC and making minor non-substantive changes for clarity. **74 Fed. Reg. 8703 (Feb. 26, 2009).**

FEDERAL ESTATE AND GIFT TAXATION

GENERATION SKIPPING TRANSFER TAX. A decedent had created a trust which was irrevocable on September 25, 1985. Upon the decedent's death, the trust was divided into a residuary trust and a marital trust for the surviving spouse. Upon the death of the surviving spouse, the marital trust was included in the spouse's gross estate under I.R.C. § 2041(a)(2). Under I.R.C. § 2652(a)(1)(A), the spouse became the transferor for GST tax purposes with respect to the marital trust. The spouse allocated all of the GST exemption to the marital trust and as a result of such allocation, the marital trust had an inclusion ratio of zero. The marital trust assets were added to the residuary trust upon the death of the spouse. The residuary trust was divided into two trusts - trust 1 for the benefit of a child and issue and trust 2. Trust 1 consisted of two portions (1) one portion from residuary trust which was exempt from GST tax under Treas. Reg. § 26.601-1(b)(1)(i) and (2) one portion from marital trust which had an inclusion ratio of zero. The child petitioned a state court for the termination of trust 1 and received the distribution. The IRS ruled that the terminating distributions from Trust 1 pursuant to a court order would not be subject to GST tax. **Ltr. Rul. 200908003, Feb. 25, 2009**.

The decedent's estate included two trusts, a marital trust and a family trust. On the estate tax return, a QTIP election was made for the marital trust and the GSTT exemption was allocated to the family trust. However, the family trust was not large enough to use the entire GSTT exemption amount. The estate's tax return preparer failed to recognize the availability of allocating some of the GSTT exemption amount to the marital trust through a reverse-QTIP election and the error was not discovered until after the due date for the return passed. The IRS granted an extension of time to file an amended return with the reverse-QTIP election and allocation of the remaining GSTT exemption to the reverse-QTIP amount. **Ltr. Rul. 200908002, Oct. 20, 2008**.

FEDERAL INCOME TAXATION

LEGISLATION. The American Recovery and Reinvestment Act of 2009 is cited as Pub. L. No. 111-5 and was signed into law on February 17, 2009. See Harl,"American Recovery and Reinvestment Act of 2009, 20 *Agric. L. Dig*. 25 (2008).

CASUALTY LOSSES. The taxpayer's residence was damaged in October 2007 by a wildfire in an area which was declared a disaster area by the President. Although the taxpayer intended to make an election under I.R.C. § 165(i) to claim the deduction for the loss on the taxpayer's 2006 tax return and the taxpayer had a professional tax return preparer construct and file the return, the return was filed without the election. The IRS granted the taxpayer an extension of time to file the election. **Ltr. Rul. 200907019, Nov. 4, 2008**.

COOPERATIVES. The taxpayer was a rural non-profit telephone cooperative. The taxpayer had entered into a partnership with other telephone companies to develop cellular phone service in rural areas. The partnership eventually produced income, which was distributed to the taxpayer's members/patrons. The taxpayer later decided to sell its interest in the partnership and distribute the sales proceeds to its members/patrons. The IRS ruled that the proceeds from the sale were patronage-sourced income excludible from the taxpayer's income. **Ltr. Rul. 200907014, Oct. 23, 2008**.

The taxpayer was a tax-exempt electric cooperative. The taxpayer's board decided to amend the bylaws to allow early retirement of capital credit accounts held by its members. The accelerated payments did not result in any forfeiture of patronage, capital or governing rights of the members but only gave the members what was owed to them earlier than originally planned. The IRS ruled that the early retirement of the capital credit accounts did not affect the tax-exempt status of the taxpayer. **Ltr. Rul. 200907040, Nov. 19, 2008**.

COURT AWARDS AND SETTLEMENTS. The taxpayer was terminated from employment after disputes with co-workers.

The taxpayer suffered depression and anxiety but made no claims for compensation for any medical costs or conditions. The taxpayer and employer reached a mediated settlement in which the employer paid the taxpayer $65,000 for enhancement of employment opportunities, relocation expenses and health insurance. The taxpayer did not include the settlement proceeds in taxable income. The court held that the settlement proceeds were taxable income because the proceeds were not received as compensation for physical injuries. **Moulton v. Comm'r, T.C. Memo. 2009-38**.

The taxpayer was employed with one employer for many years and developed physical injuries which may have resulted from the stress of employment. The taxpayer was terminated from employment and filed suit for age and disability discrimination in termination of employment. The parties reached a settlement which awarded an amount to the taxpayer for "emotional distress damages." The settlement also paid an additional amount to the taxpayer's attorneys. The court held that the amount paid directly to the taxpayer was taxable income because the amount was not received as compensation for physical injuries. The court noted that, although the employment may have contributed to the taxpayer's physical disability, there was no claim that the termination of employment caused any physical injury. The court also held that the amount paid to the attorneys was taxable income to the taxpayer and eligible for a miscellaneous deduction. The court removed an accuracy-related penalty because it found that the taxpayer had reasonably relied on a tax return preparer to omit the settlement payments from taxable income. **Carranza v. Comm'r, T.C. Summary Op. 2009-28**.

The taxpayer was employed as a private investigator and was injured while performing duties for the employer. The taxpayer was fired when the taxpayer refused to continue working with the physical injury. The taxpayer filed an action for wrongful termination and received a judgment. The court found that the lawsuit was a tort action under state law but held that the judgment was taxable income because the claim was based on wrongful termination and did not claim that the termination caused any physical injury for which compensation was sought. **Colquitt v. Comm'r, T.C. Summary Op. 2009-27**.

DISASTER LOSSES. On January 30, 2009, the president determined that certain areas in Washington are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of a severe winter storm and flooding, which began on January 6, 2009. **FEMA-1817-DR.** On January 28, 2009, the president determined that certain areas in Arkansas are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on January 26, 2009. **FEMA-3301-EM.** On January 28, 2009, the president determined that certain areas in Kentucky are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on January 27, 2009. **FEMA-3302-EM.** On January 30, 2009, the president determined that certain areas in Missouri are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on January 26, 2009. **FEMA-3303-EM.** Accordingly, taxpayers in the may deduct the losses on their 2008 federal income tax returns. See I.R.C. § 165(i).

EMPLOYEE BENEFITS. The IRS has released information to assist employers in claiming a credit for the COBRA medical premiums they pay for former employees. The new information includes an extensive set of questions and answers for employers and a revised version of the quarterly payroll tax return that employers will use to claim the credit for the COBRA premiums paid. Form 941, Employer's Quarterly Federal Tax Return, which is to be used to claim the new COBRA premium assistance payments credit, beginning with the first quarter of 2009, will be sent to employers in mid-March. Under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, eligible former employees who were enrolled in their employers' health plans at the time they lost their jobs are required to pay only 35 percent of the cost of COBRA coverage. Employers must treat the 35-percent payment by eligible former employees as full payment but may claim a credit for the other 65 percent of the COBRA cost on their payroll tax returns. **IR-2009-15**.

FIRST-TIME HOMEBUYER CREDIT. The IRS has issued a clarification of the first-time homebuyer credit ($8,000 maximum) as amended by the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. The issue was when the revised credit could be claimed. The revised credit applies only to homes purchased after December 31, 2008 and before December 1, 2009. The taxpayer may elect to treat the purchase as made on December 31, 2008 and include the credit on the taxpayer's 2008 return. Otherwise, the credit is claimed on the 2009 return. The IRS has published revised Form 5405, First-Time Homebuyer Credit, on the IRS web site www.irs.gov/pub/irs-pdf/f5405.pdf. If the home was *actually purchased* after April 8, 2008 and before January 1, 2009, the taxpayer must limit the credit to the $7,500 maximum (subject to repayment over 15 years, starting in 2010) under prior law. **IR-2009-14**.

GENERAL WELFARE EXCLUSION. The IRS has held that payments to individuals by governmental units under legislatively provided social benefit programs for the promotion of the general welfare and not for compensation for services are excludable from the recipient's gross income ("general welfare exclusion"). A state enacted legislation establishing a program under which the state provided taxpayers with a one-time payment of up to $500 if they purchase and install in residential structures energy efficient furnaces or boilers that either meet or exceed federal Energy Star standards or are not less than 84 percent efficient. A payment was not dependent upon the purchase price paid for the boilers or furnaces. The payments were made directly to or on behalf of low and moderate-income households from the state's general fund. Taxpayers who receive payments under the program did not receive a tax deduction or credit on their state income tax returns for purchasing qualified boilers or furnaces. Moreover, the payment is not in the form of a refund of any tax paid to the state. In a Chief Counsel Advice letter, the IRS ruled that the payments were excludible from federal taxable income of the recipients. **CCA Ltr. Rul. 200908025, Nov. 5, 2008**.

INNOCENT SPOUSE. The taxpayer had been married in a community property state during the tax years involved in this case. The taxpayer's spouse had quitclaimed the spouse's sole ownership in the residence to the couple as community property. The taxpayer and spouse filed delinquent joint tax returns and were assessed additional taxes, penalties and interest for several tax years. The taxpayer paid the amounts due from the proceeds of a sale of the residence and filed a claim for refund based on an innocent spouse relief claim. The taxpayer sought a refund, if allowed innocent spouse relief, from one-half of the amount paid from the proceeds of the residence. The court held that the relief provided under I.R.C. § 6015 for innocent spouses did not override the community property law. Because the taxpayer did not prove that any of the amounts paid for the taxes came from the taxpayer's separate property, no refund was allowed for the taxpayer's share of community property used to pay the taxes. **Karp v. Comm'r, T.C. Memo. 2009-40**.

The taxpayer filed joint income tax returns with the taxpayer's spouse but did not pay the taxes owed. After assessment of the unpaid taxes, the taxpayer filed Form 8857, Request for Innocent Spouse Relief for the taxes owed. The court examined several factors in determining that the taxpayer was not entitled to innocent spouse relief because (1) the taxpayer and spouse had a history of nonpayment of taxes and estimated taxes, (2) the taxpayer did not show that any financial hardship would result from payment of the taxes, and (3) the taxpayer did not claim to know about the underpayment of taxes. The court held that these factors outweighed the one factor which favored relief, that the underpayment of tax was primarily attributable to the spouse's business activities. **Martino v. Comm'r, T.C. Memo. 2009-43**.

INSTALLMENT PAYMENT OF TAXES. The taxpayer owed back taxes and filed a request to pay the taxes in installments. The IRS rejected the request because the taxpayer was not otherwise in compliance since a corporation owned by the taxpayer had incorrectly characterized payments to the taxpayer as distributions instead of wages. The taxpayer had reported the distributions as income and was otherwise in compliance with all tax obligations. The court held that the failure of the corporation to comply with tax rules could not be used as a reason to deny a request for installment payment of taxes. **Haubrich v. Comm'r, T.C. Memo. 2009-45**.

INVOLUNTARY EXCHANGES. The taxpayer owned and operated a commercial property which was subject to condemnation by a governmental authority. The taxpayer purchased an 80 percent share of another corporation which owned a property similar to the one condemned. The corporation acquired the property by purchasing its subsidiary which owned the property initially. The IRS ruled that the stock purchased was eligible like-kind replacement property for the condemned property for purposes of I.R.C. § 1033 deferment of gain. **Ltr. Rul. 200907007, Nov. 5, 2008**.

PARTNERSHIPS

BASIS ADJUSTMENT. The taxpayer was a limited liability company taxed as a partnership. One of the members acquired the interest of a former member but the partnership tax return inadvertently failed to include the I.R.C. § 754 election to adjust partnership tax basis in partnership property. The IRS granted an extension of time to file an amended return with the basis election. **Ltr. Rul. 200908018, Nov. 18, 2008**.

TRANSACTIONS WITH PARTNERS. The IRS has withdrawn the proposed regulations originally issued at *69 Fed. Reg. 68838 (Nov. 26, 2004)*. Under I.R.C. § 707(a)(2)(B), transfers to and by a partnership that are more properly characterized as transactions between the partnership and one who is not a partner or between two or more partners acting other than in their capacity as partners shall be treated as such transactions. Regulations have been issued under this section for re-characterization of "disguised" sales of property to and from a partnership. The IRS has now issued proposed regulations governing the re-characterization of disguised sales of partnership interests. After withdrawal of the proposed regulations, guidance will come from the statutes, legislative history and case law. **Ann. 2009-4, 2009-1 C.B. 597**.

RETURNS . The IRS has extended return-filing and payment deadlines for victims of the severe storms and tornadoes in Carter, Logan and Oklahoma Counties in Oklahoma that were declared federal disaster areas on February 10, 2009. The filing extension does not apply to information returns in the W-2, 1098, 1099 series, or to Forms 1042-S or 8027, or to employment or excise tax deposits. However, penalties for failure to timely file information returns can be waived, for reasonable cause, under existing procedures. In addition, the IRS will abate penalties and interest for failure to make timely employment and excise tax deposits due between February 10, 2009, and February 25, 2009, so long as the deposits were made by February 25, 2009. **Oklahoma Disaster Relief Notice, OK-2009-3**.

The IRS has issued a revenue procedure providing guidelines and general requirements for the development, printing, and approval of substitute tax forms. Approval will be based on these guidelines, and after review and approval, submitted forms will be accepted as substitutes for official IRS forms. The guidelines do not cover a number of forms, including Forms W-2, W-2c, W-3, W-3c, 941 and Schedule B, 1040-ES (OCR), 1041-ES (OCR), 1096, 1098 series, 1099 series, W-2G and 1042-S. **Rev. Proc. 2009-17, 2009-1 C.B. 517**.

SAFE HARBOR INTEREST RATES

March 2009

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	0.72	0.72	0.72	0.72
110 percent AFR	0.79	0.79	0.79	0.79
120 percent AFR	0.86	0.86	0.86	0.86
		Mid-term		
AFR	1.94	1.93	1.93	1.92
110 percent AFR	2.13	2.12	2.11	2.11
120 percent AFR	2.33	2.32	2.31	2.31
		Long-term		
AFR	3.52	3.49	3.47	3.46
110 percent AFR	3.88	3.84	3.82	3.81
120 percent AFR	4.23	4.19	4.17	4.15

Rev. Rul. 2009-8, I.R.B. 2009-10.

STATE AND LOCAL BONDS. The IRS has issued the nationwide average purchase price for residences and the average area purchase price safe harbors for residences located in statistical areas in each state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the Virgin Islands, and Guam. The average purchase price is used to determine whether bonds issued by a state or local subdivision are a "qualified mortgage issue" under I.R.C. § 143(a)(2)(A) such that the bonds are a qualified bond under I.R.C. § 103(b). Interest from state and local qualified bonds are excludible from gross income under I.R.C. § 103. **Rev. Proc. 2009-18, I.R.B. 2009-9**.

TAX SHELTERS. The taxpayer invested in a cattle breeding partnership which was marketed and operated as a tax shelter. The taxpayer did little research into the partnership and did not seek professional tax advice as to the legitimacy of the tax claims made by the partnership promoter. The taxpayer's tax deductions from the partnership were disallowed and the taxpayer was assessed accuracy-related penalties. The taxpayer argued that the penalties should not be imposed because of a mistake of fact and the fraudulent claims of the partnership promoter. The court held that the penalties were properly applied because the taxpayer failed to take any reasonable steps to verify the promoter's claims, especially since the taxpayer was not experienced at investing, cattle breeding or tax matters. On appeal, the court held that the penalty under I.R.C. § 6662(h) for gross undervaluation was inappropriate because the underpayment of tax resulted from a disallowance of deductions. The taxpayer argued that the other penalties for negligence were improper because the promoter's claims were difficult to verify. The other penalties were upheld because the court held that the standard was not whether the claims were verifiable but whether the taxpayer made sufficient attempts to verify the tax claims, which the court found was not the case here. The appellate decision is designated as not for publication. **McDonough v. Comm'r, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,239 (9th Cir. 2009), *aff'g in part and rev'g in part*, T.C. Memo. 2007-101**.

TRAVEL EXPENSES. The taxpayer was employed as an airplane mechanic near the taxpayer's residence when the taxpayer was laid off. The taxpayer continued to work for the employer by accepting a job in another city where the taxpayer had seniority. The employer had subsequent layoffs and the taxpayer was forced to move several times to new locations where the taxpayer had seniority. The taxpayer maintained a residence in the original city in hopes of returning to a job there. The court held that the taxpayer was not entitled to deduct travel expenses from the residence to the temporary job locations because each job had an uncertain and indefinite duration. **Moujahid v. Comm'r, T.C. Memo. 2009-42**.

WITHHOLDING TAXES. The IRS has issued new withholding tables which incorporate the new Making Work Pay credit enacted as part of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. The tables will also be published as part of IRS Pub. 15-T. **IR-2009-13**.

NEGLIGENCE

EMPLOYER LIABILITY. The defendant owned a farm which was jointly operated with the defendant's son. The property was owned by the defendant and the defendant provided 20 percent of the expenses and received 20 percent of the revenues. The son provided 80 percent of the expenses and received 80 percent of the revenues. On the day of the accident, the son had been applying fungicide to the farm land through an irrigation system. The son was also a licensed insurance agent but did not participate in the defendant's insurance business. The son was traveling from the farm to the defendant's residence to mow the lawn when the son was involved in an accident with the plaintiff. The plaintiff sought to hold the defendant liable for the son's negligence under a theory of employer vicarious liability. The court held that the defendant was not vicariously liable for the son's negligence because the son was not performing any farming duties or insurance sales duties when traveling to the defendant's residence to mow the lawn. **Granillo v. McKinzie, 2009 Tex. App. LEXIS 728 (Tex. Ct. 2009)**.

NUISANCE

RIGHT-TO-FARM. The plaintiff filed a nuisance suit against the defendant grain elevator for fugitive dust emissions which settled on the plaintiff's property. The defendant argued that the Louisiana Right-to-Farm Law, La. Rev. Stat. § 3:3603 *et seq*., shielded it from liability. The plaintiff argued that the statute did not apply because of (1) the defendant's history of receiving citations for emissions violations, (2) the defendant's lack of records, and (3) the damage suffered by the plaintiff demonstrated that the defendant was not using generally accepted agricultural practices. The court held that, under the statute, a defendant can only be held liable if (1) the operation was not conducted in accordance with generally accepted agricultural practices and the person bringing the action acquired the interest in the land or improvements alleged to be affected by the nuisance before the date on which an agricultural operation was in existence; or (2) the agricultural operation was not established prior to any change in the character of the property in the vicinity of the agricultural operation. The court held that the plaintiff had the burden to prove that an agricultural operation was not operated in accordance with generally accepted agricultural practices. The court also held that violations of environmental laws and regulations were relevant only if shown to be part of the general accepted practices in the defendant's area. The court upheld a summary judgment for the defendant in that the plaintiff failed to demonstrate the standards for generally accepted agricultural practices, either by evidence of local practices or expert testimony. **Albert v. Peavy Co., 2009 U.S. Dist. LEXIS 9084 (E.D. La. 2009)**.

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