The Missouri Federal District Court identified several factors in analyzing whether the contracts in question were futures contracts, subject to the Commodity Exchange Act, or were cash forward contracts not subject to CEA. The factors included— (1) whether the contracts had "inherent value," (2) market characteristics; (3) whether delivery is contemplated; (4) the underlying purpose of the contracts; (5) whether standardized form contracts were used; and (6) the nature of the parties to the transactions involved in the dispute.

The court sided with the elevator and held that the contracts were within the cash forward contract exception. Accordingly, the federal court dismissed the action. The case now goes back to state court.

* * * * *

The two cases, in Minnesota and Missouri, both found the contracts in question to be cash forward contracts. The Missouri case, however, did not involve a focus on sales of crops beyond what was in storage or could be produced in the current production cycle. More court decisions are expected—and these two may be appealed.

FOOTNOTES

1 See generally 10 Harl, *Agricultural Law* § 74.04 (1997).

2 See Harl, "Hazards of Hedge-to-Arrive Contracts," 7 *Agric. L. Dig*. 77 (1997).

3 7 U.S.C. § 6(a). See *In re* Bybee, 945 F.2d 309, 312 (9th Cir. 1991).

4 7 U.S.C. § 1(a)(11).

5 *In re* Grain Land Coop Case, Civ. No. 3-96-1209 (D. Minn. 1997).

6 See n. 4 *supra.*

7 7 U.S.C. § 1(a)(11).

8 H.R. Rep. No. 93-975, 93d Cong., 2d Sess. 129-130 (1974); See CFTC v. Co Petro Mktg. Group, Inc., 680 F.2d 573, 579 (9th Cir. 1982). See also "Characteristics Distinguishing Cash and Forward Contracts and 'Trade' Options," 50 Fed. Reg. 39656, Sept. 30, 1985.

9 Bunker v. Farmers Elevator Co. of Hopkins, Civ. No. 97-0137-CV-W-SCW (W.D. Mo. 1997).

10 See n. 2 *supra.*

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

CLAIMS. Two banks had obtained judgments against the debtor on loans made to the debtor for agricultural operations. The debtor then filed for Chapter 12. Because the value of the collateral securing the loans was much less than the judgments, the debtor's Chapter 12 plan classified the judgments as partially unsecured. The banks and the debtor negotiated the value of the collateral securing the claims and the plan included the agreed-to value which was higher than the value originally attributed to the property. The court found that the value agreed to was a negotiated value and not a value determined by appraisal. The negotiated value was incorporated into the Chapter 12 plan. The plan did not mention the unsecured portion of the banks' claims but did list other unsecured claims. Under the plan, the unsecured claims would not receive any payments. The plan was confirmed. During the plan period, the debtor received an inheritance which was eventually included in the debtor's disposable income available for payment of unsecured claims. The banks sought a modification of the plan to include their unsecured claims. The debtor argued that the banks had waived the unsecured claims. The court agreed, holding that, because the banks had negotiated a higher value of the collateral under the original plan in exchange for the release of their unsecured claims, the banks had waived those unsecured claims. **First Nat'l Bank v. Allen, 118 F.3d 1289 (8th Cir. 1997)**.

EXECUTORY CONTRACTS. The debtor had purchased a farm from a bank for $40,000 in cash and a contract to pay the remainder in installments. The contract provided that the bank remained the title holder until the final installment was paid. At that time, the bank was to provide a warranty deed to the property. Title insurance was purchased for the debtor and the contract was recorded. The bank claimed that the contract was executory, requiring the debtor to affirm or reject the contract. The debtor argued that the contract was a secured financing device, allowing the debtor to modify the terms of the contract under the Chapter 11 plan. Although the court noted that several other courts have held that all land sale installment contracts were or were not executory, the court followed *In re Robert L. Helms Contr. & Dev. Co., 110 F.3d 1470 (9th Cir. 1997)* in examining all the circumstances to determine the nature of the contract. The court examined Idaho law to determine the nature of the contract rights and obligations. Under Idaho law, when the debtor's equity exceeded the seller's damages from a breach of the contract, the contract must be foreclosed in the same manner as a mortgage. The court found that, under the contract, the bank's only remaining obligation under the contract was to supply title to the property and the debtor's only obligation was to pay the remaining obligation. The bank argued that it also had the obligation to provide marketable title. The court found no basis for this distinction, noting that the bank would have no motivation for clouding the title. The court also ignored the characterization in the contract that the contract was executory, holding that the true nature of the contract was to operate as security for the debtor's obligation to make

the installment payments. ***In re* Heward Bros., 210 B.R. 475 (Bankr. D. Idaho 1997)**.

SETOFF. The debtor had obtained a loan from the FmHA on which the debtor had defaulted pre-petition. The debtor had also enrolled farm land in the Conservation Reserve Program (CRP). The FmHA (now FSA) notified the debtor of its application to the ASCS (now also FSA) to offset the debtor's CRP payments against the default on the debtor's FmHA loan. The offset was allowed, the debtor filed for Chapter 13 and the debtor assumed the CRP contract. The debtor argued that the FmHA was not entitled to offset the CRP payments in the bankruptcy case because the CRP contract was executory and contingent upon the debtor's performance. In addition, the assumption of the contract post-petition destroyed the mutuality between the pre- and post-petition CRP contracts. The court held that the filing of the bankruptcy case and assumption of the CRP contract did not change the basic rights and obligations of the parties and that the CRP payments could be offset against the debtor's debt to the FmHA. The District Court remanded the case but remand was delayed for rulings at the circuit court level. In spite of circuit court rulings that the CCC was a separate governmental agency, allowing setoff, the Bankruptcy Court held that setoff was not allowed in this case because post-petition CRP payments were too contingent upon funding from Congress and the debtor's compliance with the CRP contract. ***In re* Buckner, 211 B.R. 46 (Bankr. D. Kan. 1997), *on rem. from*, 165 B.R. 942 (D. Kan. 1994)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

AUTOMATIC STAY. After the debtor filed for Chapter 7, the IRS sent the debtor a Notice of Proposed Assessment of an I.R.C. § 6672 penalty as a responsible person in a corporation which failed to pay employee taxes. The IRS argued that the Notice did not amount to an assessment or attempt to collect the penalty. The court noted, however, that the Notice threatened collection if the debtor did not pay the penalty or file a protest within 30 days, and the court held that the Notice was an assessment of a penalty in violation of the automatic stay. The court also held that actions which violated the automatic stay were void *ab initio*; therefore, the IRS penalty assessment was void. The appellate court reversed, holding that the violation of the automatic stay did not cause the assessment to be void. **Riley v. United States, 118 F.3d 1220 (8th Cir. 1997), *rev'g*, 192 B.R. 727 (E.D. Mo. 1995)**.

The IRS began collection efforts against the debtor by seizing the debtor's inventory of automobiles. During the seizure process, the debtor filed for Chapter 11 and informed the IRS agents that further seizure of the automobiles would be a violation of the automatic stay. The agents contacted their superior who authorized the continued seizure. The autos were removed and placed in a secured lot until their return was ordered by the court. The debtor sought damages for violation of the automatic stay. The court held that the IRS agents acted in a good faith belief that the post-petition seizure was allowed because the levy was served on the debtor pre-petition. In addition, the court held that the debtor was not entitled to any damage award because the debtor failed to prove any actual damages from the post-petition removal of the autos. The court further held that the IRS was not entitled to any recovery for its expenses in executing the levy. ***In re* A & J Auto Sales, Inc., 210 B.R. 667 (Bankr. D. N.H. 1997)**. See also ***In re* A&J Auto Sales, Inc., 205 B.R. 676 (Bankr. D. N.H. 1996)** p. 75 *supra*.

The debtors filed for bankruptcy and before the IRS was served with notice of the filing, the IRS filed a levy with the debtors' bank against the debtors' bank account. The debtors' attorney informed the IRS about the bankruptcy filing but the IRS refused to return the levied funds. The debtors claimed that the loss of the use of the funds resulted in a default on their mortgage payment and incurring of legal fees from the default, legal fees from bringing the current action and bank fees to process the levy. The court held that, although the initial levy was a good faith levy, the retention of the funds was an intentional violation of the automatic stay; therefore, the debtors were entitled to recover their actual, consequential damages from the violation. ***In re* Milto, 210 B.R. 687 (Bankr. D. Md. 1997)**.

DISCHARGE. The debtors filed their 1990 tax return in October 1992. The debtors filed a Chapter 7 petition in September 1994 which was dismissed in November 1994. The debtors filed the current Chapter 7 case in January 1995. The debtors sought discharge of their 1990 taxes as filed more than three years before the petition. The court held that the first Chapter 7 filing tolled the three year period limitation of Section 523. ***In re* Brent, 97-2 U.S. Tax Cas. (CCH) ¶ 50,699 (C.D. Ill. 1997)**.

POST-PETITION PENALTIES AND INTEREST. The IRS had filed undisputed pre-petition priority tax claims in the debtors' Chapter 12 case. Payment of the taxes was provided in the plan and a discharge was granted after all plan payments were made. The IRS then sought payment of interest and penalties which accrued post-petition on the priority tax claims. The court held that, as in Chapter 13 cases, post-petition interest on tax claims in Chapter 12 cases is discharged upon payment of the underlying tax claim. The court also held that I.R.C. § 6658(a)(2)(B)(ii) precludes imposition of tax penalties on tax claims during the pendency of a bankruptcy case. ***In re* Mitchell, 210 B.R. 978 (Bankr. N.D. Tex. 1997)**.

POST-PETITION TAXES. In December 1993, the debtor filed for Chapter 11 and did not make the election to end the debtor's tax year upon the filing of the petition. In February 1994, the debtor, as debtor-in-possession, paid the debtor's individual 1993 taxes from estate property. The court ordered the debtor to return the funds to the bankruptcy estate as an unauthorized post-petition payment. ***In re* Smith, 210 B.R. 689 (Bankr. D. Md. 1997)**.

REFUND. The debtor filed for Chapter 13 in May 1996. The debtor filed the tax returns for 1991 through 1995 in June 1996, claiming a refund for 1991 through 1994 tax years. The debtor paid the taxes for 1991 and

1992 through taxes withheld from wages by the debtor's employer. The court held that 1991 taxes were considered paid on April 15, 1992, and the 1992 taxes were considered paid on April 15, 1993, both more than three years before the debtor filed the refund claim for 1991 and 1992. The court held that I.R.C. § 6511 barred the refund claims because they were filed more than three years after the taxes were paid for the years for which the refund claims were filed. ***In re* Farrell, 211 B.R. 79 (Bankr. M.D. Fla. 1997)**.

TAX LIEN. In February 1994, the IRS filed and perfected a tax lien against the debtor's property for payment of taxes for 1988, 1990 and 1991. The debtor then filed for Chapter 7 and the taxes for those years were held to be dischargeable. The debtor sought to avoid the tax lien under Section 545(2) and I.R.C. § 6323(b) or to reduce the lien to the value of the property owned by the debtor on the date of the lien filing. The court held that the lien was neither avoidable nor reducible. ***In re* Cleary, 210 B.R. 741 (Bankr. N.D. Ill. 1997)**.

CONTRACTS

HEDGE-TO-ARRIVE CONTRACTS. The plaintiff was a farmer who entered into cash forward contracts with the defendant elevator for the sale of corn and soybeans. The plaintiff filed a suit in federal district court involving the contracts and the defendant sought removal of the case to state court. The issue was whether the contracts were governed by the Commodity Exchange Act, giving the federal court jurisdiction over the suit. The court examined several factors in holding that the contracts were not commodity futures contracts governed by the CEA. The court found that the contracts had marketing characteristics of cash forward contracts in that the terms changed over time. The court also found that the contracts involved products with inherent value and that the subject, grain, of the contracts had inherent value and was not speculative. The court also found that the parties to the contracts actually intended delivery to take place; therefore, the likelihood of delivery was greater than for speculative contracts. The opinion does not discuss whether the contracts had rollover provisions. The court also found that the parties involved were not speculators and investors. Therefore, the court held that the contracts were not commodity futures contracts not governed by the CEA. **Bunker v. Farmers Elevator Co., Civ. No. 97-0137-CV-W-SCW (W.D. Mo. Sept. 18, 1997)**. See also the lead article in this issue.

This case involved an agricultural cooperative which bought and sold grain as part of its grain elevator and agricultural services business. The grain was produced by members and sold to the cooperative through hedge-to-arrive (HTA) contracts. The other parties were the producer/members. The parties had executed several thousand HTA contracts over the years with no problems until the price of grain began a steady increase over two years. In order to stem its losses from the contracts, the cooperative sought to terminate the HTA contracts in favor of regular sales contracts. The producers sought to enforce the contracts as written. The cooperative argued that the contracts were unenforceable commodity futures contracts which did not comply with the Commodity Exchange Act. The cooperative pointed to the rollover provisions which made the contracts indefinite as to delivery and to the pricing terms which allowed future price changes. The court held that the contracts were cash forward contracts because the parties were both in the grain business, intended delivery and had established a pricing mechanism under the contracts. The court noted that, although the contracts had rollover provisions which could continue indefinitely, the parties had used the contracts for actual delivery over the years without problems. ***In re* Grain Land Coop. Cases, Civ. No. 3-96-1209 (D. Minn. Sept. 25, 1997)**.

FEDERAL AGRICULTURAL PROGRAMS

COMMUNITY LOANS. The FSA has issued proposed regulations governing the Community Programs Guaranteed Loan Program. The proposed regulations move the regulations to a new subpart, shift loan documentation and analysis responsibility to lenders, and generally streamline the regulations governing the program. **62 Fed. Reg. 52277 (Oct. 7, 1997), adding 7 C.F.R. § 1980.801 *et seq***.

DISASTER ASSISTANCE. The FSA has issued interim regulations implementing the 1997 tree assistance program. The program is limited to losses from natural disasters occurring from October 1, 1996 through September 30, 1997. Cost-share assistance may not exceed 100 percent of the eligible replacement or rehabilitation costs and may be based on average costs or the actual costs for the replanting practices, as determined by the Deputy Administrator for Farm Programs. **62 Fed. Reg. 50849 (Sept. 29, 1997)**.

PEANUTS. The CCC has adopted as final removal of the regulations governing approval of cold storage warehouses for peanuts under the peanut support program because the CCC no longer uses cold storage warehouses. **62 Fed. Reg. 51760 (Oct. 3, 1997)**.

FEDERAL ESTATE AND GIFT TAX

ESTATE INCOME. The decedent died in 1988, survived by siblings and descendants of deceased siblings. The estate was not administered until 1996 when administrators were appointed. No estate tax returns were filed until 1996. The estate received items of income during 1988 through 1996. Under state law, personal property did not pass to heirs until collected by an administrator, all claims against the estate were paid, and the property was distributed to the heirs. The IRS ruled that the income generated by the estate property was income to the estate and not to the heirs. The IRS noted that a penalty for failure to file estate income tax returns would apply unless the failure resulted from a reasonable

cause and not willful neglect. **Ltr. Rul. 9740009, June 27, 1997**.

GIFT-*ALM* § 6.01.* A decedent's estate had created a trust for the decedent's children. The trust provided for quarterly income payments to the children only if the child requested the distribution for the child's support and maintenance. If no requested was made, that child's share was to be distributed to the grandchildren. The IRS ruled that the distribution power of each child was not a general power of appointment and that the failure of a child to request a distribution was not a transfer of property subject to gift tax. **Ltr. Rul. 9739006, June 20, 1997**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* The taxpayer owned an interest in a partnership. Under the partnership agreement, at the withdrawal of a partner because of death or other reason, the partnership was to pay the withdrawn partner or the partner's estate a percentage of the partnership profits for a fixed number of years in addition to an amount for the withdrawn partner's capital account. The taxpayer planned to establish a marital trust or testamentary bequest for the taxpayer's spouse and fund the bequest with the payments for the partnership interest at the death of the taxpayer. The trust or bequest would provide that partnership payments representing the percentage of profits would be allocated to principal in the amount of the payment discounted by the applicable federal rate. The remaining amount of the payment was to be allocated to income of the trust. The IRS ruled that, because the allocation of income and principal did not violate state law, the trust or bequest would qualify for the marital deduction. **Ltr. Rul. 9739015, June 26, 1997; Ltr. Rul. 9739016, June 26, 1997; Ltr. Rul. 9739017, June 26, 1997; Ltr. Rul. 9739018, June 26, 1997**.

POWER OF APPOINTMENT. The decedent had received an income interest in a trust established by a predeceased parent. The trust granted the decedent a testamentary power to appoint trust principal by will to any person. The estate argued that the power was not a general power of appointment because state law would not allow the decedent to appoint the principal to the decedent's estate. The court held that no such restriction existed under state law and that the principal was in fact appointed to the decedent's estate; therefore, the decedent held a general power of appointment over trust principal which was properly included in the decedent's gross estate. **Powers v. United States, 37 Fed. Cls. 709 (1997)**.

TAX RATES. The decedent died on January 12, 1993, when the maximum tax rate on estates was 50 percent. OBRA 1993 was signed by the President in August 1993 and retroactively reinstated the 55 percent maximum rate on estates. The case also included taxable gifts made by a taxpayer on January 18, 1993, again when the top rate was 50 percent. The gift tax top rate was also increased retroactively to 55 percent by OBRA 1993. The decedent's estate and the taxpayer challenged the retroactive increase of the top estate and gift tax rates as unconstitutional as an unapportioned direct tax, as a violation of due process, and an improper governmental taking. The court held that the retroactive application of the top rates was constitutional as a rational exercise of the legislative purpose of raising revenue and was not a confiscation of property. **Quarty v. U.S., 97-2 U.S. Tax Cas. (CCH) ¶ 60,288 (D. Ariz. 1997)**.

TRUSTS. The taxpayer owned a second summer residence which included four lakeside acres split into three lots. One lot contained a residence, the second contained a guest houe and the third was unimproved. The total acreage is comparable tlo the size of other properties in the neighborhood. The IRS ruled that the entire property was a qualified residence under Treas. Reg. § 25.2702-3(b). **Ltr. Rul. 9739010, June 24, 1997**.

FEDERAL INCOME TAXATION

COURT AWARDS AND SETTLEMENTS. The taxpayer's employment was terminated and the taxpayer sought restitution from the employer. After negotiations, the parties agreed to a lump sum payment in settlement of the taxpayer's grievances. The taxpayer argued that the payment was excludible from gross income because the payment was made in settlement of several tort claims. The court held that the payment was includible in gross income because the only claims raised by the taxpayer in the negotiations were contract related and the employer was not aware of any tort claims. The appellate court affirmed in an opinion designated as not for publication. **Foster v. Comm'r, 97-2 U.S. Tax Cas. (CCH) ¶ 50,687 (9th Cir. 1997), *aff'g*, T.C. Memo. 1996-26**.

HOBBY LOSSES. The taxpayer was employed as a district sales manager of an insurance company with substantial income. The taxpayer purchased 5, 40 and 120 acre parcels for the construction of a residence and for use in fish farming, harvesting timberland, and growing row crops and Christmas trees. The taxpayer placed some of the land in government subsidy programs, received government disaster payments and made depreciable improvements to the land. The taxpayer reported losses from the farming activities for all seven tax years since the purchase of the property. Due to equipment failure, the fish farming activity produced only minimal sales of fish and the loss of most of the fish. At the time of the trial, no fish were being raised while a wind powered system was being installed. The Christmas tree operation had not yet produced any salable trees but the taxpayer estimated that sales would begin within two years after the trial. Although the taxpayer had begun some management of the timberland, no trees had yet been cut for sale. The taxpayer hired a local farmer to raise row crops on a small portion of the larger tract and enrolled 14 acres of the 40 acre tract in the federal CRP. The court first held that all of the taxpayer's activities on the rural land would be considered as one activity for purposes of the hobby loss provisions. The court then held that the taxpayer did not operate the farming business with an intent to make a profit, based on the following factors. (1) The taxpayer kept separate records for the business through an accountant but the taxpayer did not present the records into evidence, several checks were made for personal expenses and the books were not well organized. (2) The taxpayer did not expend much time on the farm other than

that which contributed to the personal pleasure from rural life. The row crops were produced by an independent contractor. (3) The taxpayer failed to provide sufficient evidence that the land and business assets would appreciate in value. (4) The business had losses in all years of operation. (5) The taxpayer had substantial income from other sources which would be offset by the losses. (6) The taxpayer had not had past success with similar activities or much experience at the farming activities attempted. (7) The taxpayer and family derived personal and recreational pleasure from the activities. **Holmes V. Comm'r, T.C. Memo. 1997-401**.

PARTNERSHIPS-*ALM* § 7.03.*

DEFINITION. The taxpayer purchased a commercial property with three other individuals with the intent to immediately resell the property. When the property did not sell quickly the purchasers maintained the property as a rental property and filed federal partnership income tax returns for three years. The partnership also maintained a separate bank account. The taxpayer sold the taxpayer's interest in the partnership in the fourth year. The sales contract listed the partnership interest as the interest sold and not an interest in the property itself. The taxpayer argued that the sale was of an interest in the property and the loss on the sale was ordinary loss from the sale of property held for resale, because no partnership was formed. The taxpayer pointed to the facts that no partnership agreement was executed, no trade or business was operated and the parties had no intent to form a partnership. The court held that the evidence that the partnership had income and expenses for three years and the income and losses were reported on federal partnership returns demonstrated that a partnership did exist and that the sale consisted of the sale of the taxpayer's interest in the partnership, resulting in capital losses. **Baker v. Comm'r, T.C. Memo. 1997-442**.

DISCHARGE OF INDEBTEDNESS. The taxpayer owned a 50 percent interest in a partnership which defaulted on a loan. After negotiations, the lender discharged a portion of the indebtedness. The taxpayer was allocated a 50 percent share of the discharge of indebtedness income. The IRS ruled that the taxpayer's share of the discharge of indebtedness income increased the taxpayer's basis in the partnership interest; The taxpayer's share of the decrease in partnership liabilities decreased the basis of the taxpayer's partnership interest; and the taxpayer's share of the discharge of indebtedness was excludible from the taxpayer's income if the taxpayer qualified for an exclusion under I.R.C. § 108. **Ltr. Rul. 9739002, May 19, 1997**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

INCOME AND LOSS. The taxpayer formed a wholly-owned farm S corporation. The corporation crop-share leased 800 acres of farmland from an S corporation owned by the taxpayer's spouse, who acquired ownership by transfer of the shares from the taxpayer to the spouse. The taxpayer's corporation also lease land from a third S corporation owned by the taxpayer's minor children, resulting from transfer of the farm from the taxpayer to the children. The taxpayer's spouse also owned a corporation which operated the spouse's craft business. The taxpayer did not keep separate accurate records for the various corporations and the amount owed among the corporations. The taxpayer's corporation and the taxpayer filed for bankruptcy but did not list any claim for rent due to the other family corporations in the bankruptcy proceedings. The taxpayer's corporation received SBA and FmHA disaster loans. The taxpayer's corporation also received disaster payments and crop insurance proceeds which were administratively offset against amounts owed to the SBA and the FmHA. The taxpayer's corporation did not report the insurance proceeds or disaster payments as income in the year received. The taxpayer transferred $110,000 to the spouse's craft corporation in payment of the rent owed by the taxpayer's corporation, claiming that the rent was paid in that manner because the other corporations did not have bank accounts. The court denied a deduction for the rental payments as not bona fide, because the taxpayer did not list the rents as due on the bankruptcy schedules, the rents were paid to a corporation which did not own the land and no written lease or other evidence of the rent obligation was presented as evidence. The court also held that the disaster payments and crop insurance proceeds were included in the taxpayer's income because (1) the taxpayer failed to demonstrate that the disaster payments were received (setoff) as the result of an eligible disaster under I.R.C. § 165, and (2) the crop insurance proceeds were paid as a result of the taxpayer's inability to produce a crop, not the destruction of a crop. The court noted that, as a cash method taxpayer, the taxpayer's S corporation would not have a basis in the crops for which the disaster payments and insurance proceeds were received; therefore, no casualty loss would be realized to offset the payments. **Foust v. Comm'r, T.C. Memo. 1997-446**.

SELF-EMPLOYMENT INCOME. The taxpayer was a 100 percent shareholder in two S corporations which operated restaurants and 50 percent of an S Corporation which operated a motel. The taxpayer actively participated in the operation of the businesses and operated a sole proprietorship which provided services to the corporations. The taxpayer billed the corporations for the services as an independent contractor. The taxpayer calculated net earnings from self-employment using the taxpayer's share of net income or loss from the S corporations, as well as income from the sole proprietorship. Net losses from the corporations resulted in negative net self-employment income for several tax years. The taxpayer argued that, because the self-employment tax provisions were enacted prior to the enactment of the S corporation provisions, the absence of a shareholder's share of S corporation tax items from the self-employment income definition indicated that the taxpayer's share of S corporation items was included in self-employment income. The court noted that Rev. Rul. 59-221, 1959-1 C.B. 225 had ruled that S corporation items were not included in self-employment income and that Congress had not amended the self-employment provisions to negate that ruling. The court held that, since Congress had not taken any action to change the statute after the IRS ruling, the taxpayer could not include S

corporation items of income and loss in determining the taxpayer's net earnings from self-employment. **Ding v. Comm'r, T.C. Memo. 1997-435**.

NEGLIGENCE

ATTRACTIVE NUISANCE. The plaintiff's decedent was an 11 year old boy who was killed while playing in the ruins of a burned-down farm residence owned by one defendant, on land leased by another defendant and burned down by the third defendant volunteer fire department. A portion of the chimney was left standing after the burn. The decedent was visiting a relative who lived next to the destroyed residence. The decedent was warned not to play in the ruins but returned to the area and was killed after removing several bricks, causing the chimney to collapse on top of him. The plaintiff claimed negligence based on the attractive nuisance doctrine. The defendants moved for summary judgment, arguing that the decedent was aware of the danger of removing bricks from a chimney. The court held that the decedent was old enough and shown to have at least average intelligence for his age so as to have suffiicent awareness of the danger; therefore, the attractive nuisance doctrine did not apply to impose liability on the defendants for the accident. **Griffin v. Woodard, 486 S.E.2d 240 (N.C. App. 1997)**.

SECURED TRANSACTIONS

PRIORITY. The debtor was a cotton grower who had granted a security interest in the cotton crop to the lessor of the land on which the crop was grown. The lessor executed a financing statement in April 1993. The lessor then sold the property under an agreement which allocated the rent between the lessor and the new buyer. The debtor also borrowed money from a commercial lender to finance the production of the cotton crop and granted the lender a security interest in the same crop. The lender filed a financing statement in May 1993. The debtor hired another company to harvest the cotton and granted that company a security interest in the cotton. The harvesting company filed a financing statement in July 1993. The proceeds of the cotton were insufficient to pay all of the debts and the issue was the priority of the three security interests. Under La. Rev. Stat. § 3:2651 a statutory priority was available first to laborers and second to lessors who could assert a lessor's privilege. An initial issue was whether the statute applied to the proceeds of the cotton. The court held that the priority statute applied to harvested and unharvested cotton so long as the security interest arose while the cotton was unharvested. The parties argued that the harvesting company was not a laborer entitled to the top priority under the statute. The court held that the harvesting company was not entitled to the top priority as a laborer because the company hired other workers to actually harvest the cotton. The court also held that the lessor could not assert statutory priority because the lessor did not assert its lessor's priority within 15 days after the cotton was harvested. The court also held that the buyer of the land did not have a perfected security interest in the cotton crop because no assignment of the security interest was included in the sale agreement and the buyer failed to properly perfect a security interest in the cotton crop. Thus, the priority of the security interests was based on the date of perfection as to the original lessor, the lender and the harvesting company. **Bayou Pierre Farms v. BAT Farms Partners, III, 693 So.2d 1158 (La. 1997),** ***aff'g*****, 676 So.2d 643 (La. Ct. App. 1996)**.

STATE REGULATION OF AGRICULTURE

CORPORATE OWNERSHIP OF AGRICULTURAL LAND. The plaintiff was a cooperative organized under the Nebraska Nonstock Cooperative Marketing Act (NCMA) with five individuals as member/shareholders. The plaintiff applied for and expected to be granted exempt status under I.R.C. § 521(a) as a farmer-owned cooperative providing products solely to its members on a patronage basis. The plaintiff sought to acquire an existing swine farrowing and nursery facility to operate solely for the benefit of its members. All pigs produced in the facility would be distributed to the members only. Article XII, Section 8 of the Nebraska Constitution restricted the ownership of agricultural land by corporations but exempted nonprofit corporations. The trial court had held that a nonstock cooperative was a nonprofit corporation and was exempt from the land ownership restrictions. Section 21-1401(2) of the NCMA stated that cooperatives formed under the act were deemed nonprofit and the plaintiff argued that this statement was controlling for purposes of the land ownership restriction. The appellate court disagreed, finding that the cooperative was formed for the purpose of distributing profits to the members and did not qualify as a nonprofit corporation for purposes of the land ownership restrictions. **Pig Pro Nonstock Coop. v. Moore, __ N.W.2d __, 253 Neb. 72 (Neb. 1997)**. An article by Dr. Harl on this case will be published in a future issue of the *Digest*.

CITATION UPDATES

In re **Fegeley, 118 F.3d 979 (3d Cir. 1997)** (discharge of taxes) see p. 147 *supra*.

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• Gifts and federal gift tax, including problems with future interests, handling estate freezes, and "hidden" gifts.

• Income tax aspects of property transfer, including income in respect of decedent, installment sales, private annuities, self-canceling installment notes, and part gift/part sale transactions.

• Using trusts, including funding of revocable living trusts.

• Organizing the farm business--one entity or two, corporations, general and limited partnerships and limited liability companies.

• Ethics (2 hours).

The Agricultural Law Press has made arrangements for **group discount air fares** on United Airlines, available through Sun Quest Vacations. In addition, attendees are eligible for **substantial discounts on hotel rooms at the Hilton Waikoloa Village Resort**, the site of the seminar. Early registration is important to obtain the lowest airfares and insure availability of convenient flights at a busy travel time of the year.

The seminar registration fee is $645 for current subscribers to the *Agricultural Law Digest* or the *Agricultural Law Manual*. The registration fee for nonsubscribers is $695.

If you have not yet received a registration packet call Robert Achenbach at 1-541-302-1958.

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