In applying the factors to the situation in *Trentadue*,[15] the court found the factors tended to suggest that both assets were land improvements rather than machinery or equipment. In dictum, the court noted that ". . . an above-ground irrigation system would more likely be classified as machinery or equipment, whereas one buried in the ground would more likely be classified as a permanent land improvement.[16] That leaves open the possibility that above-ground center pivot irrigation facilities might be seven year property.

Other authority for water wells

For over half a century, IRS has maintained that the drilling costs for water wells were not depreciable but parts of wells such as piping and casings were depreciable.[17] Yet, a passage in the regulations[18] under the soil and water conservation deduction provision[19] stated that expenditures for making structures such as wells involved depreciable property.[20] Also, IRS ruled in 1972 that water wells providing water for raising poultry or livestock "whether they are unlined or contain replaceable or nonreplaceable casings or linings " were "other tangible property" and, thus, eligible for investment tax credit,[21] which was then available.[22] To be eligible for investment tax credit, the property had to be depreciable property.[23]

The Tax Court decision in *Trentadue*[24] did not cite any of those authorities. Indeed, the court in *Trentadue*[25] stated that "there is no question in this case about whether the subject assets were depreciable."[26] That statement, and the holding in the case, would seem to resolve the question of whether water wells with a determinable life (as established in *Trentadue*) used for business purposes are, in fact, depreciable. Moreover, it is the position of the Tax Court that water wells are 15-year property, eligible for 150 percent declining balance depreciation.[27] If upheld by the Ninth Circuit Court of Appeals, which is expected, the guidance should have even greater standing.

Footnotes

1 I.R.C. § 168(c).

2 Trentadue v. Comm'r, 128 T.C. No. 8 (2007). See generally 4 Harl, *Agricultural Law* § 29.06[a] (2006); Harl, *Agricultural Law Manual* § 4.03[4][c] (2006); Harl, *Farm Income Tax Manual* § 508 (Matthew-Bender 2006).

3 See Rev. Proc. 1987-56, 1987-2 C.B. 674, as modified by Rev. Proc. 1988-22, 1988-1 C.B. 785 (business horses).

4 128 T.C. No. 8 (2007).

5 *Id.*

6 See I.R.C. § 168(c); Rev. Proc. 1987-56, 1987-2 C.B. 674, § 5.02, asset class 01.1.

7 *Id.*

8 *Id.*

9 Trentadue v. Comm'r, 128 T.C. No. 8 (2007).

10 Rev. Proc. 1987-56, 1987-2 C.B. 674, § 5.02, asset class 00.3.

11 E.g., Rev. Rul. 1956-599, 1956-2 C.B. 122.

12 65 T.C. 664 (1975).

13 Rev. Proc. 1987-56, 1987-2 C.B. 674, § 5.02, asset class 00.3.

14 Whiteco Industries, Inc. v. Comm'r, 65 T.C. 664 (2007).

15 Trentadue v. Comm'r, 128 T.C. No. 8 (2007).

16 *Id.*

17 Rev. Rul. 1956-599, 1956-2 C.B. 122.

18 Treas. Reg. § 1.175-2(b)(1).

19 I.R.C. § 175.

20 Treas. Reg. § 1.175-2(b)(1).

21 I.R.C. § 48(a)(1), repealed in 1986. See Harl, *Agricultural Law* § 32.03[1] (2006).

22 Rev. Rul. 1972-222, 1972-1 C.B. 17.

23 I.R.C. § 48(a)(1). See Rev. Rul. 1981-120, 1981-1 C.B. 20 (deep wells for disposal of liquid waste eligible for investment tax credit).

24 Trentadue v. Comm'r, 128 T.C. No. 8 (2007).

25 *Id.*

26 *Id.*

27 I.R.C. 168(b)(2)(A).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

SURVEY. The defendants purchased their land with a fence and trees on the southern border which they considered to be the boundary between their land the the plaintiff's land. The defendants eventually cleared some of the trees and removed most of the fence, using the disputed strip as clear land which they mowed on a regular basis, built a grape arbor, cultivated a garden and added landscaping. The plaintiff planned to develop its land and had a survey conducted for the purpose of locating the actual boundary line, which turned out to be several feet onto the area mowed by the defendants. The plaintiff sought to quiet title and the defendants claimed title by adverse possession. The trial court granted summary judgment to the defendants, holding that a survey was insufficient to toll the time limitation for adverse possession and that the defendants' actions were sufficient for adverse possession use. The appellate court reversed, holding that a survey was sufficient to toll the time limit for adverse possession where the survey was conducted for the purpose of determining the true boundary as part of a plan to develop the land under survey. Editor's note: if this rule gains support in other jurisdictions, it can have a major change in adverse possession cases which often are commenced after a survey performed as part of the use of newly acquired land. The plaintiff also argued that the defendants' activities on the disputed strip were insufficient to support adverse possession. The court noted that most of the activities did not fully encroach upon the disputed strip and that the defendants had acknowledged that they did not know where the boundary was and had asked to purchase the disputed area from the plaintiff. The court held that these circumstances proved insufficient hostile use of the disputed strip and reversed the trial court's summary judgment for the defendants. **Crown Credit Co. Ltd. v. Bushman, 2007 Ohio App. LEXIS 1152 (Ohio Ct. App. 2007)**.

BANKRUPTCY

FEDERAL TAX

DISCHARGE. The debtor failed to timely file and pay income taxes for 1986 and 1987. In April 1990 the IRS filed a notice of deficiency for the 1987 taxes and in May 1990 filed a notice of deficiency for the 1986 taxes. Assessments were made for both years in October 1990. In September 1993 the debtor filed income tax returns for 1986 and 1987 showing no taxable income. The IRS audited both returns and increased the tax liability for both years. The debtor timely filed an income tax return for the 1996 tax year. The debtor filed for Chapter 7 in December 1999 and sought discharge of the taxes. The issue was whether the 1993 returns for 1986 and 1987 constituted returns for purposes of Section 523, allowing discharge of taxes for which a return was filed more than two years before the bankruptcy filing. The IRS cited the four elements used in *In re Hindenlang, 164 F.3d 1029 (6th Cir. 1999)* (it must purport to be a return; it must be executed under penalty of perjury; it must contain sufficient data to allow calculation of tax; and it must represent an honest and reasonable attempt to satisfy the requirements of the tax law). The IRS argued that the returns were not eligible for Section 523 because they were not an honest and reasonable attempt to satisfy the filing requirements. The debtor argued that the returns met the requirements because the IRS used the returns to increase the tax liability. The IRS claimed that any tax liability determination was made on the basis of the prior notices of deficiency. The court held that there was insufficient evidence to support a summary judgment on the issue without evidence of what the IRS used to make the final tax liability determination. ***In re* Ford, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,383 (Bankr. W.D. Ky. 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

FARM LOANS. The FSA has issued proposed regulations which clarify and simplify the number of days' interest that may be paid to lenders on loss claims on guaranteed farm loans. The liquidation provisions currently provides a time frame for the interest payment based upon "the date of the decision to liquidate" which can often be difficult to determine. The proposed regulations establish that the maximum number of days for interest payments on a loss claim will be 210 days from the loan payment due date. In addition, the proposed regulations clarify the application for payment after liquidation and the guaranteed lender's responsibility for future recoveries. **72 Fed. Reg. 14244 (March 27, 2007)**.

GENETICALLY MODIFIED ORGANISMS. The APHIS has issued a notice describing its policy for responding to low-levels of regulated genetically engineered plant materials which may occur in commercial seeds or grain. This notice is intended to provide clarification for the public and developers of genetically engineered plants of APHIS' response to such situations. The policy statement does not confer any rights upon or create any rights for any person and does not operate to bind APHIS or the public, nor does it address how other federal agencies might respond to such situations. **72 Fed. Reg. 14649 (March 29, 2007)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT. The petitioner was a produce buyer who had failed to promptly pay for many orders of agricultural produce. The petitioner notified the unpaid sellers that the petitioner was terminating business and entered into work-out agreements under which most sellers accepted about half of the amount owed in fear that the alternative was no payment. The USDA charged the petitioner with violation of PACA and published the facts and circumstances as the sanction for the violations, because the petitioner's license had already been terminated for lack of renewal payment. The petitioner argued that the work-out agreements eliminated the requirement that payment be made promptly, because the sellers voluntarily accepted the lesser payment. The court noted that the only enforceable effect of the work-out agreements was that the sellers would lose their protection under the PACA trust provisions. The court also noted that a large sum of money was still owed to sellers who did not agree to lesser payments; therefore, the petitioner could still be found to have violated the prompt payment provisions. **Baiardi Food Chain v. USDA, 2007 U.S. App. LEXIS 4793 (3d Cir. 2007)**.

VIRUS-SERUM-TOXIN ACT. The plaintiffs was a beef processor who wanted to test all cattle it slaughters for bovine spongiform encephalopathy (BSE - commonly known as mad cow disease). The plaintiff sought approval from the USDA for the purchase of BSE testing kits to carry out the program. The USDA denied the request and issued a notice that the sale and use of BSE testing kits would be restricted to laboratories approved by state and USDA animal health officials. The USDA cited 9 C.F.R. §§ 104.1, 102.5(d) (governing import of biological products and the restriction on the use of a biological product). The plaintiff argued that 9 C.F.R. § 102.5(d) exceeds the USDA's statutory authority to regulate viruses, serums, toxins, or analogous products only as to the preparation, sale, barter, or exchange of such products but not their "use." The plaintiff also challenged the USDA's inclusion of diagnostic tests within its definition of two key statutory terms, "analogous products" and "treatment." See 9 C.F.R. § 101.2. The plaintiff argued that BSE diagnostic tests cannot be regulated under the statute because the tests are neither "analogous" to viruses, serums, or toxins, nor used "in the treatment of domestic animals," as required by the statute. The court held that the plaintiff's reading of the statutory authority was too narrow and that the BSE test kits were within the reasonable scope of the authority to control and regulate the use of similar products for the diagnosing of animals for disease. **Creekstone Farms Premium Beef, LLC v. USDA, 2007 U.S. Dist. LEXIS 22851 (D. D.C. 2007)**.

FEDERAL ESTATE AND GIFT TAXATION

FAMILY-OWNED BUSINESS DEDUCTION. The decedent's surviving spouse was named executor of the estate but the surviving spouse died before timely filing the federal estate tax return. The decedent's estate included qualifying interests in a family-owned business. The successor executor filed the decedent's estate tax return late and sought an extension of time to make the FOBD election on the late return. The IRS granted the extension because the failure to timely file the return and make the election was prevented by the death of the executor (surviving spouse). **Ltr. Rul. 200713018, Dec. 7, 2006**.

The decedent's estate hired a CPA to prepare and file the estate tax return and the CPA initially determined that the estate did not qualify for the FOBD and file a timely estate tax return without the election. On reconsideration, the CPA determined that the estate did qualify for the election and sought an extension of time to file an amended return with the election. The IRS granted the extension because the estate acted reasonably and in good faith in using the CPA to prepare the original return. **Ltr. Rul. 200712042, Oct. 16, 2006**.

POWER OF APPOINTMENT. Before September 25, 1985, the decedent created an irrevocable trust for the decedent's benefit with the decedent's son as remainder beneficiary and the decedent's spouse as remainder beneficiary and trustee. Upon the death of the decedent, the surviving spouse had an inter vivos and testamentary power of appointment over the trust corpus to appoint trust property to descendants of the decedent but not to the surviving spouse, the surviving spouse's estate or the surviving spouse's creditors. The surviving spouse did make a contribution to the trust. The IRS ruled that the power of appointment was not a general power of appointment; therefore, only the portion of the trust allocable to the property transferred to the trust by the spouse would be included in the surviving spouse's gross estate. The spouse had the authority as trustee to distribute trust property to the spouse for health, maintenance, support and eduction. The IRS ruled that the spouse's exercise of the testamentary power of appointment or exercise of the trustee power to distribute property would not cause the trust to be subject to GSTT. **Ltr. Rul. 200712008, Oct. 26, 2006**.

FEDERAL INCOME TAXATION

CAPITAL ASSETS. The IRS has adopted as final regulations governing the capitalization of costs under the simplified service cost and the simplified production methods under Treas. Reg. §§ 1.263A-1(h)(2)(i)(D), (k) and (l). Under the rules, property eligible for these methods includes self-constructed tangible personal property that is considered produced on a routine and repetitive basis in the ordinary course of a taxpayer's trade or business. Property produced on a routine and repetitive basis means units of tangible personal property that are mass-produced. **72 Fed. Reg. 14675 (March 29, 2007)**.

COURT AWARDS AND SETTLEMENTS. The taxpayer was employed by a talent agency and was fired with much publicity in the media. The taxpayer sued the employer for defamation and breach of contract and the parties reached a settlement agreement which provided for payments. The first payment occurred prior to the effective date of the Small Business Job Protection Act of 1996 and three payments occurred after the Act. The court held that the payments were made in settlement of a tort claim but not for physical injuries; therefore, the first payment was excludible from income but the payments made after the effective date of the Small Business Job Protection Act of 1996 were included in income. **Polone v. Comm'r, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,392 (9th Cir. 2007), *aff'g*, T.C. Memo. 2003-339**.

DEPRECIATION. The taxpayers operated a vineyard growing wine grapes. The taxpayers installed trellis systems which were used to improve the growing conditions and quality of the grapes and installed drip irrigation systems and dug a well. The taxpayers claimed depreciation deductions for the trellis system based on a 10-year class life as agricultural equipment (seven year property). The IRS argued that the trellising system was properly depreciated with a class life of 25 years because the trellising system was designed to last for the productive life of the vines, 25 years, and was a permanent improvement of the land. The court held that the trellising system was properly depreciated by the taxpayer because the trellises could be easily moved and reused elsewhere. However, the court held that the drip irrigation system and well were properly depreciated with a class life of 20-years (15-year property) as land improvements because the irrigation system could not be easily moved. **Trentadue v. Comm'r, 128 T.C. No. 8 (2007)**.

DISASTER LOSSES. On March 14, 2007, the president determined that certain areas in Iowa 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 storms, which began on February 23, 2007. **FEMA-1688-DR.** On March 13, 2007, the president determined that certain areas in California are eligible for assistance from the government under the Act as a result of a severe freeze, which began on January 11, 2007. **FEMA-1689-DR.** On March 12, 2007, the president determined that certain areas in Indiana are eligible for assistance from the government under the Act as a result of a record snow, which began on January 11, 2007. **FEMA-3274-DR.** Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2006 returns.

DISCHARGE OF INDEBTEDNESS. The taxpayers, husband and wife, owned all of an S corporation which became insolvent in 1992. A receiver was appointed and an involuntary bankruptcy petition was filed against the corporation. The corporation's assets were collected and sold by the bankruptcy trustee and the bankruptcy case was closed in 1996. The taxpayers claimed that the S corporation received discharge of indebtedness income during 1992-1994 when several creditors wrote off corporation debts. The taxpayers argued that this discharge of indebtedness caused recognition of discharge of indebtedness income which increased their basis in the corporation stock and allowed them to deduct suspended losses from pre-bankruptcy tax years within three years. The issue was when the discharge of indebtedness occurred, with the taxpayers arguing that the corporation's debts were discharged in the year the creditors agreed to accept less than full payment on their claims. The IRS argued that the discharge did not occur until the bankruptcy case was closed. The taxpayers did not provide any written evidence to support the timing of the discharge of indebtedness but merely claimed that the debts were discharged during the bankruptcy. The court held that, because the bankruptcy case was continuing throughout 1992-1994, no final identifiable event occurred to cause the recognition of discharge of the indebtedness until the close of the case in 1996; therefore, the discharge of indebtedness did not occur until the bankruptcy case was closed. **Alpert v. United States, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,378 (6th Cir. 2007), *aff'g*, 430 F. Supp. 682 (N.D. Ohio 2006)**.

The taxpayer borrowed money from a bank and defaulted on the loan. In a suit to recover the loan funds, the bank agreed to a settlement for less than the principal owed and agreed not to charge any interest or penalties. The bank issued a Form 1099-C which listed the forgiven amount as discharge of indebtedness income. The bank did not issue a form for the excluded interest and penalties. The taxpayer sought a summary judgment in a suit against the IRS, arguing that no discharge of indebtedness income was realized because the taxpayer did not receive any cash or property. The court denied summary judgment for the taxpayer, holding that discharge of indebtedness income can result from forgiveness of loan principal and related charges. **Hahn v. Comm'r, T.C. Memo. 2007-75**.

ELECTRICITY PRODUCTION CREDIT. The IRS has announced the 2007 inflation adjustment factor (1.3433) and reference price used in determining the availability of the renewable electricity production credit to taxpayers producing electricity using wind at 3.29 cents per kilowatt hour. The inflation adjustment factor and reference prices apply to calendar year 2007 sales of kilowatt hours of electricity produced in the U.S. and its possessions from qualified energy resources. The renewable electricity production credit for calendar year 2007 is 2.0 cents per kilowatt hour on sales of electricity produced from wind energy, closed-loop biomass, geothermal energy and solar energy and 1.0 cents per kilowatt hour on sales of electricity produced from open-loop biomass, small irrigation power, landfill gas and trash combustion facilities. **72 Fed. Reg. 14862 (March 29, 2007)**.

FUEL CREDIT. The IRS has announced that the reference price that is to be used in determining the availability of the I.R.C. § 45K tax credit for the production of fuel from nonconventional sources for calendar year 2006 is $59.68. Because the reference price exceeds $23.50 multiplied by the inflation adjustment factor, the credit per barrel equivalent of qualified fuel sold in calendar year 2006 is reduced by $2.31 to $4.72. The nonconventional source fuel credit for 2005 is $3.18 per barrel-of-oil equivalent of qualified fuels. **Notice 2007-38, I.R.B. 2007-18**.

LIKE-KIND EXCHANGES. The taxpayer owned rental real property and wanted to enter into a like-kind exchange with another person who was a related party under I.R.C. § 1031(f)(3). The related party did not own like-kind replacement property and the parties hired an unrelated third party to acquire replacement property using funds supplied by the taxpayer. Because the intermediary required the closing of the sale of the replacement property before the exchange, the whole transaction was structured as a reverse like-kind exchange under Rev. Proc. 2000-37, 2000-2 C.B. 308, *modified by* Rev. Proc. 2004-51, 2004-2 C.B. 294. After the exchange was accomplished, the related party sold the taxpayer's original property within two years after the exchange. The IRS ruled that the taxpayer did not recognize gain from the exchange or the subsequent sale of the exchanged property by the related party. The sale of the exchanged property within two years did not result in recognition of gain because the related party did not own any property before the exchange took place. **Ltr. Rul. 200712013, Nov. 20, 2006**.

LODGING. The taxpayer was employed as a computer engineer with an U.S. corporation and was assigned to a project in Australia. Although the work was performed on an air base, the taxpayer was assigned housing in a town 22 miles away. The employer paid for the housing and issued a Form 1099-MISC including the value of the housing as income to the taxpayer. The taxpayer argued that the value of the lodging could be excluded from income under I.R.C. § 119(c) because the housing was assigned to the taxpayer, thus being similar to a camp maintained by the employer. The court held that the housing did not qualify as a camp because the housing was accessible to the public. Because the housing was not on the employer's premises or a camp established by the employer, the value of the housing was included in taxable income. **Nielsen v. Comm'r, T.C. Summary Op. 2007-53**.

PASSIVE ACTIVITY LOSSES. The taxpayers, husband and wife, each owned a corporation which operated a business. The corporations rented office space in the taxpayers' residence. The taxpayers also had passive income from other rental properties but those properties had net operating losses. The taxpayers offset the losses against the rental income from the office space lease. The IRS recharacterized, under Treas. Reg. § 1.469-2(f)(6), the office rent as nonpassive because the taxpayers materially participated in the business activities of the lessees. Thus, the office rent income was ineligible for offset against the other rental losses. The taxpayers argued that the recharacterization rule was invalid as contrary to the passive activity rules. The court pointed to several Tax Court and appellate cases which have upheld the recharacterization rules. The taxpayers also argued that the recharacterization improperly negated their bona fide business purpose for renting the office to the corporations. The court noted that the statute and legislative history supported giving the IRS wide authority for determining which rental activities could be recharacterized and noted that neither the statute nor the regulations had any requirement that the lease agreement not be bona fide before recharacterization could be used. The court upheld the recharacterization of the rental income from the office as nonpassive activity income ineligible for offset against other passive activity income. **Beecher v. Comm'r, 2007-1 U.S. Tax Cas. (CCH) ¶ 50,379 (9th Cir. 2007), *aff'g sub nom.*, Cal Interiors, Inc. v. Comm'r, T.C. Memo. 2004-99**.

PERSONAL SERVICE CORPORATIONS. The taxpayer corporation performed architectural services and was owned by two employees. The corporation also had treasury stock representing about half of the value of the corporation. The taxpayer argued that the corporation did not qualify as a personal service corporation because the treasury stock was not owned by an employee. The court held that the corporation was taxable as a personal service corporation because the treasury stock had no value since it was owned by the corporation, leaving all outstanding stock owned by employees. **Robertson Strong & Apgar Achitects, P.C. v. Comm'r, T.C. Summary Op. 2007-48**.

PREPRODUCTIVE PERIOD. The taxpayer operated a business which grew wine grapes and produced wine from the grapes, although some were grapes sold to other producers. The taxpayer used the accrual method of accounting and treated the grape growing and wine production operations as a single trade or business. The taxpayer sought a ruling as to the end of the preproductive period for the grapes. The IRS first noted that the grapes themselves are mostly transformed into juice for wine and are not sold until converted to wine. However, the IRS ruled that, for purposes of Treas. Reg. § 1.263A-4(b)(2)(i)(C)(2)(i), the sale or disposition of the grapes occurs no later than when the grapes are crushed in preparation for the winemaking because (1) the grapes change their character when crushed, (2) the crushed grapes become part of the wine production process which is distinct from the grape-growing process, (3) the crushing marks the point when all growing costs end and the wine production costs begin, and (4) the grape growing operation is a farming business and the wine production operation is a nonfarming business. Therefore, the IRS ruled that the capitalization of preproduction costs into the value of the grapes ends no later than the crushing of the grapes. The taxpayer also sought a ruling as to which costs must be capitalized for the period between the harvest of a grape crop and the blossoming of a subsequent crop on the same vines. The IRS noted the general rule that, after the end of the actual preproductive period for a grape vine, the preproductive costs are capitalized to a crop during the preproductive period of the crop and are deducted as a cost of maintaining the vine when incurred between the end of the actual preproductive period of one crop and the beginning of the actual preproductive period of the subsequent crop. See Treas. Reg. § 1.263A-4(b)(2)(i)(D), Ex. (7)(ii). The IRS noted that costs incurred after the harvest of the crop and that do not contribute to the production of the crop are "field costs" which are not required to be capitalized as preproductive costs. The IRS stated that field costs include irrigation, fertilization, spraying and pruning of the vines but do not include administration, tax depreciation, repairs of farm buildings, farm overhead costs and taxes other than state and federal income taxes. Thus, preproductive costs must be capitalized if they occur after the harvest of one grape crop and the crushing of the subsequent grape crop, with the exception that field costs incurred after harvest need not be capitalized. **Ltr. Rul. 200713023, Nov. 20, 2006**.

RENEWABLE DIESEL FUEL CREDIT. The IRS issued guidance on the credit and payment provisions applicable to renewable diesel fuel and renewable diesel mixtures that were effective on January 1, 2006. Specifically, the guidance addresses fuel produced by co-processing biomass and petroleum feedstocks. A renewable diesel mixture is treated as a biodiesel mixture for purposes of Notice 2005-4, 2005-1 C.B. 289, as modified by Notice 2005-62, 2005-2 CB 443. Only the portion of the mixture attributable to biomass qualifies as renewable diesel used in the production of a renewable diesel mixture. Taxpayers claiming a credit or payment for renewable diesel mixtures must use generally accepted scientific practices to establish the portion of the fuel that is attributable to biomass. **Notice 2007-37, I.R.B. 2007-27**.

RETURNS. The IRS has issued a list of common mistakes made by individuals in filling out their income tax returns. The errors include: (1) choosing the wrong filing status, (2) failing to include or using incorrect Social Security numbers, (3) failing to use the correct forms and schedules, (4) failing to sign and date the return, (5) claiming ineligible dependents, (6) failing to file for the earned income credit, (7) improperly claiming the earned income credit, (8) failing to report and pay domestic payroll taxes, (9) treating employees as independent contractors, (10) failing to file a return when due a refund, (11) failing to check liability for the alternative minimum tax, and (12) failing to request federal telephone excise tax. **Notice 2007-35, I.R.B. 2007-15**.

SELF-EMPLOYMENT INCOME. The taxpayer performed services for an employer who paid for the services by sending checks to a company. There was no discussion of the type of entity of the company. The taxpayer deposited the checks in a bank account under the company name over which the taxpayer had signature authority. The court found that the taxpayer failed to prove the existence of the company or that the company paid the taxpayer for any services; therefore, the court held that the amounts paid for the taxpayer's services were income to the taxpayer and not the company. **Davenport v. Comm'r, T.C. Memo. 2007-76**.

TAX SCAMS. The IRS has issued a warning about web site and e-mail tax scams. The IRS reminds taxpayers that the address of the official IRS web site is www.irs.gov and that all other sites purporting to be IRS sites without that address should be avoided. The IRS also noted that it never sends unsolicited e-mails, never asks for personal information, and never initiates contact with taxpayers by e-mail; therefore, unsolicited e-mails purporting to be from the IRS should be deleted. Such e-mails should be forwarded to the IRS at phishing@irs.gov **IR-2007-75**.

TRAVEL EXPENSES. The IRS has announced the applicable terminal charge and the Standard Industry Fare Level mileage rates for determining the value of noncommercial flights on employer-provided aircraft in effect for the first half of 2007 for purposes of the taxation of fringe benefits .**Rev. Rul. 2007-17, 2007-1 C.B. 805**.

I.R.C. § 274(h) disallows deductions for expenses incurred in connection with conventions, seminars or similar meetings held outside of the "North American Area." The IRS has issued an updated list of the states, possessions and countries included in the "North American Area" for purposes of Section 274(h). **Rev. Rul. 2007-28, I.R.B. 2007-18**.

SECURED TRANSACTIONS

PRIORITY. The debtor sold lime to several customers. The customers purchased the lime with cash but left the lime at the debtor's facility for delivery as needed. The purchased lime was not segregated from other purchased lime until delivery. The customers had received only a portion of the lime when the debtor filed for bankruptcy. The debtor had granted a security interest to a bank in all inventory, including lime. The customers, creditors in the bankruptcy case, sought to have their interest in the lime declared superior to the bank's security interest in the lime, arguing that they held their interests as buyers in the ordinary course of business (BIOC). The Bankruptcy Court determined that the creditors did not qualify as BIOCs because (1) they did not have physical possession of the lime, (2) the lime was not "identified" and the debtor was not insolvent at the time of purchase, and (3) the creditor were not entitled to specific performance of the sales contract because replacement goods were available. The creditors argued that they had obtained constructive possession of the purchased lime through the sale agreements' identification of the amount of lime involved. The court held that the mere identification of a quantity of lime, a fungible commodity, was insufficient to create even constructive possession of the lime. The court noted that the parties needed to make some attempt to physically separate or designate the lime in order to create constructive possession sufficient to make the creditors BIOCs. ***In re* Western Iowa Limestone, Inc., 2007 Bankr. LEXIS 796 (Bankr. 8th Cir. 2007)**.

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by Neil E. Harl

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SELECTED ISSUES IN FARM TAXATION

By Roger A. McEowen

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