

possessed no power to accumulate income because of pressure of adverse death tax consequences if QTIP not available).

- ⁶ I.R.C. § 2056(b)(7)(B)(ii). See *Est. of Boydston v. Comm'r*, T.C. Memo. 1984-312, *aff'd without pub. op.*, 774 F.2d 1173 (9th Cir. 1985) (spouse's life estate interest in trust not eligible for marital deduction as qualified terminable interest property because spouse did not have power over corpus).
- ⁷ *Est. of Kyle v. Comm'r*, 94 T.C. 829 (1990).
- ⁸ Ltr. Rul. 9229004, March 31, 1992 (surviving spouse to receive decedent's home "subject...to the condition of his occupancy...." not a qualifying income interest for life because surviving spouse could neither convey residence nor obtain rent from it); Ltr. Rul. 8651002, Aug. 12, 1986 (devise of right of occupancy in decedent's residence to surviving spouse not

eligible QTIP because interest based on occupancy and not life of surviving spouse).

- ⁹ Ltr. Rul. 8736004, May 22, 1987.
- ¹⁰ Ltr. Rul. 8742001, June 30, 1987 (failure to live in residence for at least one month in any calendar year).
- ¹¹ Ltr. Rul. 8843004, July 27, 1988 (proceeds of sale to be distributed to decedent's child).
- ¹² Ltr. Rul. 9040001, July 8, 1990 (50 percent of proceeds held in trust for spouse for life produced QTIP as to 50 percent).
- ¹³ Ltr. Rul. 9033004, no date given.
- ¹⁴ Ltr. Rul. 9126020, March 20, 1991.
- ¹⁵ *Est. of Peacock v. U.S.*, 90-2 U.S. Tax Cas. (CCH) ¶ 60,051 (11th Cir. 1990).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

FENCE. An owner of a large tract of farm land sold the northern half to the defendants and the southern half to the parents of the plaintiffs. The tracts were separated by a fence which meandered back and forth over the true boundary. Both parties testified that they did not consider the fence as the true boundary. The plaintiffs used the disputed property as pasture land, first as tenants of their parents and as full owners. The defendants used the disputed property as a trash dump and as a drain point for a sewer line. The court held that the plaintiffs' title to the disputed property could not be acquired by adverse possession through mutual recognition of the fence as the boundary because neither party ever considered the fence as the true boundary. In addition, the plaintiffs did not have exclusive possession of the disputed property because both parties made continuous use of the property. **Thornburg v. Haeker**, 502 N.W.2d 434 (Neb. 1993).

BANKRUPTCY

GENERAL

DISCHARGE-ALM § 13.03[6].* The debtor entered into a series of contracts for the sale and purchase of a horse and its foals in order to create a tax shelter for the plaintiffs. The plaintiffs paid \$15,000 to the debtor as "interest" on a promissory note given for the horse and claimed the payment as a deduction on the 1982 federal tax return. The deduction was disallowed by the IRS which considered the transactions as shams. The plaintiffs sought to have their claims against the debtor declared nondischargeable for misrepresentation and fraud. The court held that the claims were dischargeable because the plaintiffs did not rely on the representations of the debtor as to the tax deductibility of the interest payments since the plaintiffs knew that the transactions would not produce bona fide tax deductions. **In re Farley**, 156 B.R. 486 (Bankr. W.D. Pa. 1993).

EXEMPTIONS-ALM § 13.03[3]*

AVOIDABLE LIENS. The debtors claimed a homestead exemption for the equity remaining after a mortgage. The debtors sought to avoid a pre-petition judgment lien against the homestead as impairing their exemption. The court held

that because the judgment lien exceeded the debtors' exemption amount, the lien was completely avoided. **In re Osborne**, 156 B.R. 188 (Bankr. W.D. Va. 1993).

The debtor claimed a homestead exemption. The homestead was subject to four liens in the following priority order: (1) a judgment lien, (2) a creditor's judgment lien, (3) an unavoidable federal tax lien, and (4) a county tax lien. The debtor sought avoidance of the second lien as impairing the homestead exemption. The creditor argued that because the amount of the first two liens did not exceed the fair market value of the house less the exemption amount, the liens did not impair the exemption but that the later liens were the ones which impaired the exemption. The court held that the priority of the liens did not affect the impairment issue and allowed avoidance of the second lien. **In re Bradshaw**, 156 B.R. 239 (Bankr. S.D. Ind. 1993).

The debtor claimed a homestead exemption and sought to avoid a judgment lien against the house. The Bankruptcy Court had avoided the entire \$92,000 lien, although the exemption amount was only \$12,000. The creditor argued that the house was already exempt from the lien under Utah law; therefore, no impairment existed. The appellate court reversed, holding that the homestead exemption was not impaired because the lien could not affect the homestead exemption under state law. In addition, the court held that the entire lien could not be avoided but that the lien could have been avoided only to the extent of the impaired exemption amount. **In re Sanders**, 156 B.R. 667 (D. Utah 1993).

HOMESTEAD. The debtor filed a declaration of homestead post-petition and sought avoidance of judgment liens impairing the exemption. The debtor vacated the property the day after filing the homestead declaration and applied for court approval of the sale of the property. The court held that the post-petition declaration of homestead and sale of the property did not affect the debtor's right to the exemption; however, the court ordered a hearing as to whether the declaration of homestead was truthful in that the debtor's actions were contrary to the declaration that the debtor intended to use the property as a residence. **In re Zohner**, 156 B.R. 288 (Bankr. D. Nev. 1993).

More than three years before filing for Chapter 7, the debtor disposed of several non-exempt assets and used the

proceeds to purchase a house for which the debtor claimed a homestead exemption. The transactions also occurred some time before the claims of the bankruptcy creditors arose. The court allowed the exemption because the trustee and creditors failed to show any evidence of fraudulent intent to harm the creditors. *In re Rightmeyer*, 156 B.R. 690 (Bankr. M.D. Fla. 1993).

PENSION PLAN. The debtor owned an interest in a retirement plan and received disability payments from the plan. Although the debtor was suspended from employment without pay at the time of the petition, the debtor was considered still employed and could not withdraw funds from the retirement plan. The debtor also received payments from an annuity contract established as part of a settlement of a personal injury action. The court held that under Section 541(c)(2), the retirement plan was not estate property because the debtor had no access to the funds in the plan, except for the disability payments which were exempt. The court also held that the annuity contract was not a spendthrift trust because the debtor was involved in the creation of the contract. Under Section 522(d)(11)(D), the debtor was allowed an exemption for the first \$7,500 received post-petition, but the remainder of the contract was estate property. *In re Ziegler*, 156 B.R. 151 (Bankr. W.D. Wis. 1993).

TRUSTS. The debtor was a trust which owned and operated an apartment complex. The trust was 50 percent owned by the trustee and the trustee's spouse and 50 percent by third parties who acquired their interest in satisfaction of a debt owed by the trustee. The trustee operated the apartments through an unrelated management company and the trustee and spouse received all the distributions from the trust. The court held that although the trust shared several aspects of a corporation, such as limited liability, the trust was not a business trust eligible for Chapter 11 because the trust was not formed by a group of investors with the intent to operate a business for profit. The court focused on the fact that the 50 percent interest owned by the third parties was not acquired by investment and did not have any right to trust income. *In re Westgate Village Realty Trust*, 156 B.R. 363 (Bankr. D. N.H. 1993).

CHAPTER 11

TRUSTEE-ALM § 13.03[1].* The debtor was a partnership comprised of two general partners which were also partnerships. The partners were engaged in litigation over their respective interests in the debtor and over the debtor's timber sales contracts. One partner applied to have a trustee appointed in the debtor's Chapter 11 case, arguing that the adversarial relationship between the partners required the appointment of a trustee to manage the debtor's affairs. The court held that a trustee would be appointed because of the deadlock between the two general partners of the debtor. *Matter of Tahkenitch Tree Farm Partnership*, 156 B.R. 525 (Bankr. E.D. La. 1993).

CHAPTER 12

PLAN-ALM § 13.03[8].* The Chapter 12 debtor's plan provided for payment in full of a secured creditor's claim by transferring some of the real property securing the claim to the creditor sufficient, at the value set by the bankruptcy court, to repay the creditor. The plan was confirmed over

the objections of the secured creditor who argued that the creditor should have retained a lien on the remainder of the collateral real property to cover any deficiency upon sale of the property transferred under the plan. On appeal, the District Court agreed with the creditor, holding that 11 U.S.C. § 1225(a)(5)(C) required transfer of all property securing a creditor's lien before a plan could be confirmed over objection of the creditor. On remand, the Bankruptcy Court affirmed the plan after the debtor modified the plan to include a lien for the secured creditor on unsurrendered property. On appeal of that decision, the District Court affirmed the plan but removed the requirement that the creditor retain a lien on the debtor's remaining property. The appellate court affirmed. *In re Kerwin-White*, 996 F.2d 552 (2d Cir. 1993), *aff'g unrep. D. Ct. dec. aff'g*, 129 B.R. 375 (Bankr. D. Vt. 1991), *on rem. from*, 109 B.R. 627 (D. Vt. 1990).

FEDERAL TAXATION-ALM § 13.03[7].*

ADMINISTRATIVE EXPENSES. The debtor corporation had a June 1 taxable year and filed a Chapter 11 petition on December 27, 1989. The debtor paid the corporate income taxes for December 28, 1989 through May 30, 1990 and the IRS sought administrative expense status for the taxes for the June 1, 1989 through December 27, 1989 period, arguing that the taxes were assessable post-petition. The court held that the bankruptcy estate was not liable for the pre-petition taxes as an administrative expense. *In re Hillsborough Holdings Corp.*, 156 B.R. 318 (Bankr. M.D. Fla. 1993).

AUTOMATIC STAY. The debtor operated a trucking business and contracted with a third party to haul goods. The IRS served a notice of levy on the third party for the money due to the debtor from the hauling contract. Before the third party made any payments under the levy, the debtor filed for bankruptcy and notified the IRS of the filing. The third party paid the IRS the full amount of the levy post-petition. The debtor sought damages from the IRS under Section 362 for violation of the automatic stay. The debtor did not seek return of the levied funds but sought damages for the loss of business resulting from the debtor's inability to use the levied-against funds. The court held that the damages would not be allowed because the funds would not have been available to the debtor but would have been estate property. *In re Wright*, 156 B.R. 549 (Bankr. N.D. Ill. 1992).

AVOIDABLE LIENS. The debtors owned a residence for which they claimed a homestead exemption. The debtors also owed taxes, penalties and interest which were dischargeable in their bankruptcy case. However, the IRS had filed a pre-petition tax lien which attached to the debtors' residence. The debtors sought avoidance of the lien, under Section 506, to the extent the lien exceeded the value of their property. The court held that the lien could not be avoided to any extent, even as to exempt property, because tax liens are not affected by a bankruptcy case unless the underlying taxes are actually paid. *In re Koppersmith*, 156 B.R. 537 (Bankr. S.D. Tex. 1993).

CLAIMS. The debtor objected to a portion of the IRS claim for taxes and penalties in that the IRS had not made any assessment for those taxes. The court held that the IRS need not have made any assessment on the debtor before

filing a claim for taxes. *In re Davison*, 156 B.R. 600 (Bankr. E.D. Ark. 1993).

The debtor originally filed a Chapter 11 case but converted the case to Chapter 7. After the conversion, the court established a claims bar date but the IRS filed some claims more than five years after the bar date for taxes which accrued during the Chapter 11 case. The IRS argued that the claims were allowed because either (1) administrative claims in a converted case are not required to be filed or (2) the late claims were amendments of the timely filed claims. The court held that administrative claims in a converted case are required to be filed in the subsequent converted case. However, the court held that the late filed claim for FUTA taxes was allowed because a claim for FICA taxes for the same period had been timely filed. The court also held claims for FICA or FUTA taxes for periods for which tax claims had not been timely filed would not be allowed unless the five factors of *In re Miss Glamour Coat, Inc.*, 80-2 U.S. Tax Cas. (CCH) ¶ 9737 (S.D. N.Y. 1980), demonstrated that the amendments should be allowed. The court refused to grant the debtor summary judgment under these five factors because of an insufficient record. *Matter of All American of Ashburn, Inc.*, 156 B.R. 696 (Bankr. N.D. Ga. 1993).

DISCHARGE. The IRS sought to have the debtor's pre-petition taxes declared nondischargeable under Section 523(a)(1)(C) because the debtor filed fraudulent returns for the taxes or wilfully attempted to evade taxes by hiding assets. The debtor's nondebtor spouse had made two loans to the debtor and had received loans from a corporation which was owned by the debtor's sons and which employed the debtor. The debtor and nondebtor spouse kept their assets separate and filed separate tax returns. The debtor did not own any interest in the sons' corporation. The loan proceeds received by the nondebtor spouse were invested in the nondebtor spouse's separate property. The court held that the debtor did not receive any income from the nondebtor spouse's loans to the debtor or from the corporation; therefore, the debtor did not hide any assets or income from these transactions and the pre-petition taxes were dischargeable. *In re Cox*, 156 B.R. 323 (Bankr. M.D. Fla. 1993).

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS-ALM § 11.01[2].* The FmHA obtained title to the defendant's farm land through foreclosure in 1982. The FmHA leased the land to the defendant for the 1987 and 1988 crop years under the lease/buyback program. The FmHA decided to terminate the lease and sought a court order to remove the defendant from the property. The defendant argued that the FmHA had not complied with its regulations in failing to provide the defendant with a copy of the regulations for the lease/buyback program, the softwood timber program and homestead protection program as required by the Agricultural Credit Act of 1987. The court held that the defendant was not entitled to receive the copy of the regulations because the requirement applied only to borrowers and the defendant was not a borrower since the

loans had been foreclosed. The court held that the defendant was not entitled to the homestead protection provisions because the defendant failed to timely apply for the program after receiving the application from the FmHA. The court also held that the defendant was not eligible for the softwood timber program because the defendant was not a borrower. *United States v. Rode Corp.*, 825 F. Supp. 221 (W.D. Wis. 1993).

CROP INSURANCE-ALM § 13.04.* The FCIC has issued an interim rule allowing a six month delay in the payment of premiums for the 1994 nursery crop insurance policies issued in counties in Florida affected by Hurricane Andrew. *58 Fed. Reg. 46073 (Sept. 1, 1993)*.

FARM LOANS. The FmHA has adopted as final regulations identifying the type of security that can be routinely sold and the proceeds used to pay for essential family living and farm operating expenses. *58 Fed. Reg. 46074 (Sept. 1, 1993)*.

HERBICIDES-ALM § 2.04.* The plaintiffs were highway workers who claimed physical injuries from herbicides they applied which were manufactured by the defendants. The plaintiff's suit was based on the defendant's negligence for failure to warn of the dangers from use of the herbicides. The defendants claimed that their registration and approval of the herbicides under FIFRA preempted any state tort action for failure to warn. Although the court noted contrary case precedent, the court held that FIFRA preempted state tort action for failure to warn. The court noted that a state tort action may be allowed if the failure to warn involved a failure to warn by means other than a label. In this case, the plaintiffs alleged only a failure to provide a warning on the defendant's products. *King v. E.I. Du Pont Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993), *aff'g*, 806 F. Supp. 1030 (D. Me. 1992).

The plaintiff had been using the herbicide Treflan, manufactured by one defendant, on soybean crops with subsequent plantings of milo. The plaintiff was approached by a seller of Bicep, manufactured by the other defendant, to use that herbicide because it was safe when used on "safened" milo seed. The plaintiff did not inform the Bicep manufacturer that Treflan had been used on the field in the previous year. The plaintiff sued both manufacturers for failing to warn about using Bicep on Milo in years after using Treflan. The court held that because the labels on both herbicides complied with FIFRA, the failure to warn action was pre-empted by FIFRA. *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142 (N.C. Ct. App. 1993).

GRAZING PERMITS. The plaintiff purchased a ranch in 1991. The previous owners had a grazing permit for the land but the permit was revoked in 1990. The previous owners sought administrative appeal of the revocation but did not pursue judicial review of the revocation. After the purchase of the ranch, the plaintiff sought judicial review of the revocation. The court held that the plaintiff did not have standing to bring the appeal because the plaintiff did not suffer any personal injury from the revocation. The court found that the permits were fully revocable at the discretion of the Forest Service and were not assignable. The court held that the Forest Service practice of routinely granting buyers a grazing permit granted to the sellers was not sufficient to require the Forest Service to grant the permit to

all purchasers. *Fulton v. U.S.*, 825 F. Supp. 259 (D. Nev. 1993).

FEDERAL ESTATE AND GIFT TAX

GENERATION SKIPPING TRANSFERS-ALM § 5.04[6].* The decedent died in 1988 with a will executed in 1959. The will provided for a trust funded with the residuary estate. The trust beneficiaries included the decedent's grandchildren. The decedent's executor filed the estate tax return but did not include certification or other evidence that the decedent was incompetent on October 22, 1986 until death, thus exempting the trust from GSTT. The IRS allowed a late filing of the certification evidence. **Ltr. Rul. 9335004, May 18, 1993.**

The decedent died in 1974 leaving a trust for a son with the decedent's two brothers as cotrustees with a bank trustee. Although a sister was named as a successor trustee, no other successor trustees were named by the will or trust. Because of their advanced age, the trustees petitioned a state probate court to have additional family members made eligible successor cotrustees. The IRS ruled that the naming of other successor trustees by a state probate court would not subject the trust to GSTT. **Ltr. Rul. 9334030, May 25, 1993.**

TRANSFeree LIABILITY FOR ESTATE TAX. The debtor was the personal representative for the estate of the debtor's deceased father and filed the 1984 final income tax return for the decedent on April 15, 1985 and did not request any refund. The IRS sent a letter to the debtor requesting the filing of Form 1310 and evidence that the debtor was appointed as the decedent's personal representative. On August 19, 1985, the IRS assessed tax against the estate of the decedent and on October 2, 1989, assessed the tax against the debtor as transferee of the decedent's property. The debtor argued that the tax was assessed after the period of limitations for assessment, four years and 150 days after the filing of a complete return. The IRS argued that the return was not complete until the debtor filed Form 1310 in July 1985, making the assessment less than four years and 150 days after the filing of the complete return. The court held that Form 1310 was not required because the decedent's return did not seek a refund; therefore, the return was complete on April 15, 1985 and the IRS assessment against the debtor was untimely. *In re Dobisch*, 156 B.R. 546 (Bankr. W.D. Tenn. 1993).

TRANSFERS WITH RETAINED INTERESTS-ALM § 5.02[3].* Within three years of the decedent's death and when the decedent was in remission from cancer, the decedent transferred the residence to a sole heir in exchange for a mortgage, less \$20,000 as a gift. The sale contract allowed the decedent to live in the house for rent equal to the interest payments on the mortgage. In the penultimate and last year of the decedent's life, another \$20,000 of mortgage was forgiven each year. The decedent's will also caused the remaining amount on the mortgage to be forgiven. The court held that the substance of the transaction was only an attempt to avoid tax and included the entire value of the residence in the decedent's estate. **Est.**

of *Maxwell v. Comm'r*, 93-2 U.S. Tax Cas. (CCH) ¶ 60,145 (2d Cir. 1993), *aff'g*, 98 T.C. 594 (1992).

FEDERAL INCOME TAXATION

ACCOUNTING METHOD-ALM § 4.01.* The taxpayer was a corporation with a subsidiary corporation which operated a poultry and egg business, raising chickens and turkeys for eggs and meat for grocery chains, wholesale food distributors and the food service industry. The subsidiary used the farm-price method of valuing inventories and valued its chickens and turkeys at zero for inventory purposes, arguing that the poultry had no current value because the corporation did not sell the poultry to outside markets. The corporation's inventory included breeder eggs, breeder hens, pullets, laying hens, broilers, and "spent" hens. The corporation argued that the poultry had a value only upon reaching marketable age, in the case of breeders and broilers, or when the laying hens no longer produced eggs and would be sold as "spent" hens. Citing *Garth v. Comm'r*, 56 T.C. 610 (1971), *acq.*, 1975-1 C.B. 1, the IRS ruled that the laying and breeder hens must be valued each year at the "spent" hen value less the direct costs of disposition, regardless of the age of the poultry. The IRS also ruled that the poultry raised for meat are to be valued at market value which would increase as the poultry reached maturity. The actual value of the corporation's inventory was a question of fact not determinable in a technical advice memorandum. **Ltr. Rul. 9334003, May 6, 1993.**

C CORPORATIONS

STOCK EXCHANGES. The taxpayer owned 400 of the 1,000 shares of a corporation. The taxpayer agreed to exchange the stock for all of the stock of a subsidiary corporation plus cash. The IRS ruled that in determining whether the boot received by the taxpayer was to be taxed as a dividend distribution, the transaction was to be reordered such that the boot was to be considered as paid for the amount of the corporation's stock equal in value to the boot. If the exchange of the boot for stock would result in a substantially disproportionate decrease in the taxpayer's stock share before the exchange of the remaining stock, the boot was taxable as a dividend distribution. **Rev. Rul. 93-62, I.R.B. 1993-30.**

DEPRECIATION-ALM § 4.03[4].* The IRS has issued tables, revised for inflation, detailing the limitation on depreciation deductions for automobiles first placed in service during 1993:

<u>Tax Year</u>	<u>Amount</u>
1st tax year	\$2,860
2d tax year	4,600
3d tax year	2,750
Each succeeding year	1,675

The IRS also issued tables providing the amounts to be included in income for automobiles first leased during 1993. **Rev. Proc. 93-35, I.R.B. 1992-28, 51.**

COURT AWARDS AND SETTLEMENTS. The taxpayer sued a former employer for age discrimination under the federal Age Discrimination in Employment Act and won a verdict for damages, judgment interest on that

award and punitive damages. The court held that the award was excludible from income but that the judgment interest and punitive damages were includible in gross income. **Rice v. U.S.**, 93-2 U.S. Tax Cas. (CCH) ¶ 50,488 (E.D. Cal. 1993).

INTEREST RATE. The IRS has announced that for the period October 1, 1993 through December 31, 1993, the interest rate paid on tax overpayments remains at 6 percent and for underpayments remains at 7 percent. The interest rate for underpayments by large corporations remains at 9 percent. **Rev. Rul. 93-63.**

INVESTMENT TAX CREDIT-ALM § 4.04.* The taxpayer was a corporation which agreed to sell some of its assets to another corporation in exchange for stock in a "type D" reorganization. The agreement required the taxpayer corporation to transfer its remaining assets to a new corporation in another "type D" reorganization. A portion of these assets were Section 38 property for which ITC had been taken by the taxpayer. The taxpayer and the new corporation filed consolidated returns and the taxpayer argued that because the transfer of assets occurred between members of a consolidated group, no ITC was recaptured. The court held that under *Rev. Rul. 82-20, 1982-1 C.B. 6* and *Salomon, Inc. v. U.S.*, 976 F.2d 837 (2d Cir. 1992), ITC was recaptured in a divisive "type D" reorganization. **Walt Disney, Inc. v. Comm'r**, 93-2 U.S. Tax Cas. (CCH) ¶ 50,484 (9th Cir. 1993), *rev'g*, 97 T.C. 221 (1991).

PENSION PLANS. The IRS has adopted as final regulations governing the minimum coverage requirements under I.R.C. § 410(b). **58 Fed. Reg. 46835 (Sept. 3, 1993).**

The IRS has adopted as final regulations under I.R.C. § 401(l) providing for disparity in employer contributions to, and employer-provided benefits under, qualified plans. **58 Fed. Reg. 46828 (Sept. 3, 1993).**

The IRS has adopted as final regulations under I.R.C. § 401(a)(4) interpreting the requirement that contributions or benefits provided under a tax-qualified retirement plan not discriminate in favor of highly compensated employees. **58 Fed. Reg. 46773 (Sept. 3, 1993).**

The IRS has issued proposed regulations under I.R.C. § 414(r) implementing the provision that an employer may be treated as operating separate lines of business for purposes of applying the minimum coverage requirements of I.R.C. § 410(b). **58 Fed. Reg. 47090 (Sept. 7, 1993).**

The IRS has adopted as final regulations under I.R.C. § 414(s) governing the definition of compensation for qualified plans. **58 Fed. Reg. 47061 (Sept. 7, 1993).**

REAL ESTATE TAXES. The taxpayers had been living in a residence under a written lease-purchase agreement and continued to live in the house after the agreement expired. The taxpayers claimed mortgage interest and real estate tax deductions for amounts paid after the agreement expired. The court held that the deductions were not allowed because the taxpayers failed to prove that they owned the house or that the payments were made under a valid purchase agreement. **Dively v. Comm'r**, T.C. Memo. 1993-395.

RESPONSIBLE PERSON. The debtor was a general partner in a partnership which had the debtor's siblings as the other partners. The debtor did not participate in the management of the partnership. The debtor's brother

managed the partnership which was responsible for the payroll accounting of several corporations which failed to pay federal employment taxes. The IRS assessed the I.R.C. § 6672 responsible person 100 percent penalty against the partnership and to the debtor for the debtor's share of partnership expenses. The debtor argued that the brother had control of the partnership and corporations and should be the only person assessed the penalty. The court held that the evidence demonstrated that the brother's actions were in furtherance of the partnership business; therefore, the partnership, and the debtor, were the "responsible person" liable for the penalty. **Matter of Elms**, 156 B.R. 519 (Bankr. E.D. La. 1993).

SALE OF STOCK. An S corporation sold S corporation stock at a loss and the shareholders reported the loss as an ordinary loss on their individual income tax returns, although the corporation did not report the sale or loss on its tax return. The court held that the ordinary loss treatment from the sale of S corporation stock was available only to individuals and partnerships; therefore the loss had to be reported by the corporation and the shareholders as a capital loss. **Rath v. Comm'r**, 101 T.C. No. 13 (1993).

SOIL CONSERVATION EXPENSES-ALM § 4.03[1].* A U.S. citizen owned and operated a farm in a foreign country and incurred soil and water conservation expenses in accordance with a conservation plan approved by the government of the foreign country. The IRS ruled that the expenses were not eligible for the I.R.C. § 175(a) deduction of the expenses in the taxable year the expenses were incurred because the statute requires that the expenses be made by a plan approved by the U.S. Soil Conservation Service or a comparable state agency. **Rev. Rul. 93-56, I.R.B. 1993-28, 5.**

PARTNERSHIPS

PARTNERSHIP PROPERTY-ALM § 7.03[1][d].* The plaintiff and defendant, the plaintiff's son, operated a construction business as a partnership. The plaintiff also owned a ranch and operated the ranch with the partnership. In order to obtain a low interest rate FmHA loan, the plaintiff deeded the ranch to the defendant without receiving any consideration in return. The ranch continued to be operated under the partnership with no change in either partner's share of profits or expenses. The court held that the ranch remained partnership property because the parties did not intend to remove the ranch from the partnership. **Holmes v. Holmes**, 849 P.2d 1140 (Or. Ct. App. 1993), *mod. by*, 855 P.2d 1164 (Or. Ct. App. 1993).

SECURED TRANSACTIONS

ASSIGNMENT OF NOTE. The defendant had purchased a share in a syndicated Arabian stallion and gave a promissory note in partial payment. The seller transferred the note to a related partnership but did not endorse the note. The note was assigned to the plaintiff by endorsement and delivery to the plaintiff. In defense of a suit on the note, the defendant alleged fraud and breach of contract by the original sellers and violation of the breeding provisions of the purchase agreement by the plaintiff in failing to allow the breeding of the stallion on the east coast. The plaintiff argued that it was not subject to claims against the original

sellers because the plaintiff was a holder in due course. The court held that the plaintiff was not a holder in due course because the original seller did not endorse the note. However, summary judgment was not granted to the defendant because a factual issue remained as to whether the plaintiff knew or should have known about the claims against the original seller. **J.P. Morgan Delaware v. Onyx Arabians II, Ltd., 825 F. Supp. 146 (W.D. Ky. 1993).**

EQUIPMENT LEASE. The debtor had granted a bank a blanket security interest in the debtor's farm equipment. After the security interest was perfected, the debtor leased a tractor from a dealer who sought recovery of the tractor after the debtor's default. The lease left several provisions blank, including the total option purchase price, the total present value of the tractor, and the minimum guaranteed rent. Because of the missing provisions, the court found it was unable to determine the essential characteristics of the agreement as a lease or security agreement for a conditional purchase; therefore, the court held that the agreement would be construed against the drafting party, the dealer, and would be held as a security agreement subordinate to the bank's prior perfected security interest. A second creditor also claimed that it owned several pieces of equipment which it had leased to the debtor. In the alternative, if the transaction was held to be a sale, the creditor claimed that it had filed a financing statement in perfection of a security interest. In this case, the court found that the debtor's signatures on the purported lease and security agreement were forged; therefore, the court held that no lease existed and the security interest was not perfected because no valid security agreement existed. **In re Michaels, 156 B.R. 584 (Bankr. E.D. Wis. 1993).**

PRIORITY. The debtor owned and operated a farm equipment dealership and sold tractors manufactured by Kubota under a floor financing agreement which granted Kubota a security interest in the tractors in the debtor's inventory. Kubota perfected the security interest by filing. The debtor purchased one of the tractors with funds borrowed from a bank which perfected a security interest in the tractor. The debtor did not transfer the proceeds of the sale to Kubota or inform Kubota about the sale until after the debtor filed for bankruptcy. Kubota repossessed the tractor along with the other inventory after the debtor breached the financing agreement. The bank sought recovery of the tractor, arguing that its security interest had priority because the debtor purchased the tractor free of Kubota's security interest. The court held that because the debtor purchased the tractor with knowledge of the financing agreement and Kubota's security interest, the sale was not a bona fide sale and the Kubota security interest remained valid and superior to the bank's lien. **In re Dettwiller, 156 B.R. 540 (Bankr. S.D. Ohio 1993).**

PURCHASE MONEY SECURITY INTEREST. The debtor had granted a bank a blanket security interest in the debtor's farm equipment. After the security interest was perfected, the debtor purchased several pieces of equipment from a dealer, financed through the manufacturer. The equipment was delivered to the debtor prior to approval of the financing, resulting in the filing of the purchase money security interest more than 20 days after delivery of the equipment to the debtor. The manufacturer argued that the

date of "delivery" should be the date the financing was approved and not the date the debtor obtained possession. The court rejected this interpretation of Wis. Stat. § 409.312(4) because it would allow creditors almost unlimited time to file the purchase money security interest. **In re Michaels, 156 B.R. 584 (Bankr. E.D. Wis. 1993).**

SALE OF COLLATERAL. The parties had formed a partnership to operate a cattle ranch. After the partnership became indebted to the plaintiff for a substantial amount of money, the parties recapitalized the business and organized it as a corporation. The defendant's share of the partnership debt was paid by the plaintiff in exchange for a promissory note secured by the defendant's stock in the new corporation. The plaintiff fired the defendant as manager of the ranch and sought payment on the note. After the defendant defaulted on the note, the plaintiff foreclosed on the stock. After giving the plaintiff notice, the stock was sold at a public sale to the defendant for \$15,000 and the plaintiff sought a deficiency judgment for the remaining \$179,000 owed on the note by the defendant. The defendant argued that the sale was unreasonable because no public market existed for a minority interest in a closely-held corporation and that the plaintiff had depleted the assets of the corporation to make the stock worth much less. The court held that the sale was reasonable because the defendant failed to provide sufficient evidence of the value of the stock or the corporation's assets and failed to provide an alternative reasonable method of selling the stock. **Owen v. Ostrum, 855 P.2d 1015 (Mont. 1993).**

STATE REGULATION OF AGRICULTURE

FENCES. The defendant's land was separated by a section line which was under a public easement for vehicles. The defendant filed an application with the county board of supervisors for the construction of fences over the section line. The application was granted with the provision that the defendant construct a cattle guard 12 feet wide and a gateway 24 feet wide so that vehicle traffic could pass over the section line area. The plaintiff owned noncontiguous farm land on both sides of the section line but could not transport through the section several pieces of farm equipment which were over 24 feet wide. The plaintiff sought an order requiring the defendant to construct wider gates, arguing that the current gates violated state law in that not all vehicles could pass through the gates. The plaintiff argued that the definition of vehicle was established by N. D. Cent. Code § 39-01-01(38) and included self-propelled farm equipment. The court held that the definition in the statute applied only to public highways and that N. D. Cent. Code § 24-10-02 required gates wide enough only for general public vehicles such as cars or pickup trucks. In addition, the court held that the statute left the width of the gates to the discretion of the board of supervisors and refused to reverse the decision here because the plaintiff presented no evidence that the board acted arbitrarily, capriciously or unreasonably. **Ames v. Rose Township Board of Supervisors, 502 N.W.2d 845 (N.D. 1993).**

STATE TAXATION

AGRICULTURAL USE. The plaintiff landowner sought an agricultural use exemption from ad valorem property taxes for two calendar years. In the first year, the landowner began preparation for planting barley on land which had not been planted for many years. The Tax Court held that because no crop was planted on January 1 of that year, the agricultural use exemption was not allowed. In the second year, a barley crop was planted but the Tax Court held that the exemption was not allowed because the dry farming method of raising barley was too precarious for a reasonable expectation of profit from the crop. The appellate court reversed, holding that in the first year, the criterion is whether the landowner had demonstrated a bona fide intent to farm the land, and in the the second year, the plaintiff had demonstrated a reasonable expectation of profit from the non-irrigated barley crop. **Title USA v. Maricopa County, 855 P.2d 430 (Ariz. Ct. App. 1993), rev'g, 810 P.2d 633 (Ariz. Tax 1991).**

CITATION UPDATES

Est. of Frane v. Comm'r, 998 F.2d 567 (8th Cir. 1993), aff'g in part and rev'g in part, 98 T.C. 341 (1992) (self-cancelling installment notes), see p. 122 *supra*.

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ISSUE INDEX

Adverse Possession

Fence **149**

Bankruptcy

General

Discharge **149**

Exemptions

Avoidable liens **149**

Homestead **149**

Pension plan **150**

Trusts **151**

Chapter 11

Trustee **151**

Chapter 12

Plan **151**

Federal taxation

Administrative expenses **151**

Automatic stay **151**

Avoidable liens **151**

Claims **151**

Discharge **153**

Federal Agricultural Programs

Borrower's rights **152**

Crop insurance **152**

Farm loans **152**

Herbicides **152**

Grazing permits **152**

Federal Estate and Gift Tax

Generation skipping transfers **153**

Transferee liability for estate tax **153**

Transfers with retained interests **153**

Federal Income Taxation

Accounting method **153**

C corporations

Stock exchanges **153**

Court awards and settlements **153**

Depreciation **153**

Interest rate **154**

Investment tax credit **154**

Pension plans **154**

Real estate taxes **154**

Responsible person **154**

Sale of stock **154**

Soil conservation expenses **154**

Partnerships

Partnership property **154**

Secured Transactions

Assignment of note **154**

Equipment lease **155**

Priority **155**

Purchase money security interest **155**

Sale of collateral **155**

State Regulation of Agriculture

Fences **155**

State Taxation

Agricultural use **156**