of lifetime lease at fair rental value to employee); Ltr. Rul. 8812003, Dec. 17, 1987 (charitable deduction allowed for transfer of farmland and equipment subject to leases with option to purchase where rent was adequate consideration for use of farmland and equipment).

8 Treas. Reg. § 20.2055-2(e)(2)(iii).
9 Rev. Rul. 78-303, 1978-2 C.B. 122.
10 Treas. Reg. § 20.2055-2(e)(2)(ii).
11 Rev. Rul. 77-169, 1977-1 C.B. 286.
12 Ltr. Rul. 9347002, July 29, 1993.
13 *Id*.
14 Rev. Rul. 83-158, 1983-2 C.B. 159; Ltr. Rul. 8141037, July 9, 1981.
15 Rev. Rul. 84-97, 1984-2 C.B. 196.
16 Estate of Blackford v. Comm'r, 77 T.C. 1246 (1981), *acq*., 1983-2 C.B. 1.
17 Rev. Rul. 76-357, 1976-2 C.B. 285.
18 Rev. Rul. 87-37, 1987-1 C.B. 295 (charity given undivided interest in personal residence donated to charity as tenant in common with non charitable donee).
19 See, e.g., Rev. Rul. 76-544, 1976-2 C.B. 288, *revoked by* Rev. Rul. 87-37 (remainder interest held by charity and individual as equal tenants in common).
20 I.R.C. § 2055(e)(3).
21 See Treas. Reg. § 1.170A-12.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

AVOIDABLE TRANSFERS. Prior to filing bankruptcy, the debtors fraudulently transferred their farm homestead to third parties. One of the debtors' creditors filed suit in state court and received a judgment of fraudulent transfer which was filed prior to the debtors' bankruptcy filing. In the bankruptcy case, the trustee also moved for avoidance of the transfer as fraudulent. The trustee objected to the creditor's judgment lien claim against the homestead, arguing that the judgment lien did not attach to the property because the debtors did not have ownership and possession of the property when the lien was recorded. The court held that, under state law, the judgment attached to the property when filed and remained a senior interest against the property after the bankruptcy filing and during the trustee's avoidance of the transfer. ***In re* Mathiason, 16 F.3d 234 (8th Cir. 1994), *aff'g*, 170 B.R. 662, *aff'g*, 129 B.R. 173 (Bankr. D. Minn. 1991)**.

CHAPTER 13-*ALM* § 13.03.*

PLAN. The debtor had filed 11 years of "protest tax returns" and paid federal income taxes only to the extent withheld by the debtor's employer. When the IRS attempted to levy against the debtor's wages, the debtor filed a Chapter 7 case and later a Chapter 13 case. The taxes were not discharged in the first case and the second case was dismissed. The debtor filed the current case again in an attempt to stop the wage levy. The debtor's plan proposed to pay only the priority tax claims and a small portion of the unsecured tax claims. The court held that the plan was not proposed in good faith because the tax claims arose from the frivolous tax returns. The court cited several precedents upholding the principle that Chapter 13 could not be used as part of a scheme to avoid paying taxes. ***In re* Paulson, 170 B.R. 496 (Bankr. D. Conn. 1994)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

ADMINISTRATIVE CLAIMS. The debtor originally filed for Chapter 13 but converted the case to Chapter 7. The IRS filed a claim for post-petition but pre-confirmation taxes owed by the debtor. The debtor sought to have the IRS claim be given administrative expense status to be paid from the estate. The court held that only the entity possessing a claim may file for administrative expense status of the claim; therefore, the debtor could not affect the status of the IRS claim. ***In re* McNitt, 170 B.R. 706 (D. Idaho 1994)**.

AUTOMATIC STAY. The debtor filed for Chapter 7 bankruptcy in March 1989 and gave notice to the IRS. In April 1989, the IRS made a post-petition assessment of taxes in violation of the automatic stay but the violation was not challenged. The IRS also applied the debtor's post-petition tax refunds against the assessed tax liability. The debtor sought avoidance of the assessment, recovery of the refunds and sanctions. The IRS sought retroactive relief from the automatic stay for the assessment and argued that sanctions were not allowed because the IRS had not filed a claim in the case. The court denied the IRS application for retroactive relief from the automatic stay because the IRS failed to show any circumstances warranting the relief. The court held that the IRS had waived its immunity against suit because the IRS had made the assessment and had offset the refund against the assessment, in effect making a claim against the debtor. ***In re* Fingers, 170 B.R. 419 (S.D. Cal. 1994), *aff'g*, 148 B.R. 586 (Bankr. S.D. Cal. 1993)**.

OFFSET. When the debtor corporation filed for bankruptcy, the IRS was in the process of auditing the debtor's past 13 taxable years. The IRS filed a claim for taxes based on the audit which showed that the debtor had underpaid taxes in some years and overpaid taxes in other years, resulting in a net tax due. The IRS calculated the amount due by offsetting refunds against taxes due chronologically. The debtor's plan provided for full payment of federal taxes but barred any setoffs. The court characterized corporate tax returns as fluctuating over several years such that a corporation's tax obligations over several tax years could be grouped together into one long tax period; therefore, the offsetting of refunds against underpayments was not an impermissable setoff. The court

referred to the interrelatedness of corporate tax returns over several years due to carryforwards and carrybacks which make any particular tax return adjustable by prior or subsequent tax events. The application of the court's reasoning to this case is unclear because there is no mention that the refunds or underpayments resulted from carryovers or carrybacks of tax items. **Pettibone Corp. v. U.S., 94-2 U.S. Tax Cas. (CCH) ¶ 50,472 (7th Cir. 1994)**.

REFUNDS. The debtor had made various payments of federal taxes from the closing of the debtor's prior bankruptcy case in 1985 through December 31, 1991. On August 13, 1993, the debtor filed a claim for refund for payments made from August 13 through December 31, 1991. The refund claim was based on the debtor's argument that several of the 1985 through 1991 payments were for taxes discharged in the prior bankruptcy case, resulting in the August through December 1991 payments being in excess of the taxes owed. The IRS argued that the refund claim was barred by the two year statute of limitations of I.R.C. § 6511. The court held that the limitation applied only to taxes paid more than two years before a refund claim and not to the underlying cause of the excess payments; therefore, the debtor's refund claim was timely filed as to payments made after August 13, 1991, even though the reasons for the excess payments occurred prior to August 13, 1991. ***In re*** **Howard Industries, Inc., 170 B.R. 358 (Bankr. S.D. Ohio 1994)**.

CONTRACTS

DAMAGES. The plaintiff purchased peach trees from the defendant and claimed that the trees were diseased when purchased. The plaintiff sued for breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligence and breach of a written contract for the benefit of a third party. After the plaintiff presented evidence as to the loss of profits and losses from the expense of replanting the trees, the defendant moved for a nonsuit because the plaintiff presented no evidence of the difference in the value of the land with diseased trees as compared to healthy trees. The defendant cited *Posz v. Burchell, 25 Cal. Rptr. 896 (1962)* as holding that the only damages allowed for defective trees was the loss of value to the land. The court held that the damage limitation of *Posz* was incorrect and that where the land was used as an orchard, damages could include lost profits and other costs incurred because of the defective trees. **Serian Bros., Inc. v. Agri-Sun Nursery, 30 Cal. Rptr. 2d 382 (Cal. Ct. App. 1994)**.

ENVIRONMENTAL LAW

DUMP. The defendant operated a farm in the town of Wrentham. The defendant obtained a permit to raze two chicken houses, conditioned on the defendant's disposal of the materials outside of the town of Wrentham. The defendant removed all but 900 cubic yards of the materials and the Wrentham board of health sought an injunction for removal of the remaining refuse, arguing that the defendant's pile of refuse constituted an unapproved dumping ground under Mass. Gen. Law ch. 111, § 150A. The defendant argued that the pile was not a dumping ground because no additional materials were added by the defendant or by others. The court held that the definition of dumping ground did not require additions of refuse or dumping by others on the site; therefore, the injunction was properly granted against the defendant. **Board of Health of Wrentham v. Hagopian, 638 N.E.2d 48 (Mass. Ct. App. 1994)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS-*ALM* § 11.01[2][g].* The defendants defaulted on a farm mortgage with the plaintiff. The plaintiff provided the defendant with an opportunity to apply for loan restructuring but denied the application as incomplete and because the loan restructuring proposed would not make the defendant's farm viable. The defendant sought an injunction against foreclosure based on the plaintiff's improper denial of the restructuring application in that (1) the plaintiff's review of the application indicated that the application was sufficiently complete; (2) the loan officer who initially denied the application was present at the review committee session and had indicated that the application would be denied, even before the application had been submitted; and (3) the review committee used a higher standard for the application than was required by the regulations in that the committee required the defendant's operation to be viable after the restructuring. The trial court held for the defendant on all three elements but the appellate court reversed. The court held that the initial decision to review the application did not waive the committee's right to reject the application for incompleteness because the incompleteness was sufficient to prevent the committee from reaching a conclusion. The court also held that the pre-review statement by the loan officer did not affect the validity of the review committee's decision. The court also held that the review committee used a higher standard because the statute, 12 U.S.C. § 2202a(d)(1), required that any restructuring be less expensive than foreclosure and leave the debtor in a viable operating status. The court also reviewed the right of a borrower to assert violations of the regulation in defense of foreclosure. The court held that, although the Agricultural Credit Act does not provide a private right to enforce the Act's provisions, a violation of the regulations can be used as a defense to foreclosure. **Farm Credit Bank of Texas v. Sturgeon, 640 So.2d 666 (La. Ct. App. 1994)**.

The plaintiff applied for a loan to purchase a farm under the Socially Disadvantaged Farm Ownership Program (SDFOP) administered by the FmHA but the application was denied, stating that the plaintiff did not meet the program criteria. The plaintiff filed a suit under the Equal Credit Opportunity Act (ECOA), claiming that the application was denied because of the plaintiff's race. The court held that the ECOA did not contain an express waiver of government immunity from suit; therefore, the court had no jurisdiction to hear the claim. In the alternative, the court held that the application was properly denied because the plaintiff's poor credit history was a sufficient reason for denying the application. **Moore v. U.S.D.A., 857 F. Supp. 507 (W.D. La. 1994)**.

BRUCELLOSIS. The APHIS has issued interim rules changing California from Class Free to Class A for purposes of interstate movement of cattle under the brucellosis regulations. **59 Fed. Reg. 47533 (Sept. 16, 1994)**.

The APHIS has adopted as final regulations providing for payment at fair market value for whole herds of swine depopulated by brucellosis. **59 Fed. Reg. 51102 (Oct. 7, 1994)**.

CROP INSURANCE-*ALM* § 13.04.* The FCIC has announced that for the 1995 crop year only, the date for acceptance of applications for small grains, sugarcane, potatoes and nursery crop insurance has been extended to October 31, 1994. **59 Fed. Reg. 50559 (Oct. 4, 1994)**.

HORSES. The APHIS has issued proposed regulations governing interstate movement of horses testing positive for equine infectious anemia. Interstate movement directly to slaughter will be allowed under a permit and a sealed conveyance instead of official prior identification and branding. **59 Fed. Reg. 50860 (Oct. 6, 1994)**.

MIGRANT AGRICULTURAL LABOR-*ALM* § 3.04.* The plaintiffs were migrant Haitian Creole farm workers who were hired by contractors in Florida to work on the defendant's farm in New York. The plaintiffs failed to show that the defendant hired the contractors to recruit the plaintiffs; however, once the workers arrived on the defendant's farm, the plaintiffs were provided some work. The contractors were not registered under MSAWPA. The workers were not provided with housing and were transported to the field by one of the contractors who did not have a valid license to transport agricultural workers. The defendant did not maintain wage and work records on the plaintiffs and did not provide any records to the plaintiffs. The plaintiff also claimed that the defendant had promised certain types of work at certain wages and had promised housing for family members. The defendant argued that the workers were not protected by MSAWPA because the workers had no permanent residence. The court held that the plaintiffs normally resided in Florida where they were recruited; therefore, the plaintiffs were covered by MSAWPA. The court also held that the failure of the defendant to provide adequate housing, wage and work records and licensed transportation for the plaintiffs were violations of MSAWPA. The court held that the plaintiffs failed to prove that the defendant had made specific work and housing promises to the contractors; therefore, no violation occurred. The defendant, however, was held to have violated MSAWPA for failing to determine whether the contractors were registered under MSAWPA. The court awarded $500 per violation per plaintiff because the defendant's similar past violations of MSAWPA demonstrated that the violations were knowing and intentional. **Avila v. A. Sam & Sons, 856 F. Supp. 763 (W.D. N.Y. 1994)**.

The plaintiffs were migrant workers who picked beans on the defendant's farm. The plaintiffs were hired by a farm labor contractor who was in turn hired by the defendant to obtain harvesters. The defendant indicated to the contractors which fields were to be picked on any day and set the per box payment rate, but the contractors completely supervised the actual picking. Some of the plaintiffs were injured in an automobile accident while being transported to one of the defendant's field and alleged several violations of the MSAWPA. Defendant argued that the MSAWPA did not apply because the plaintiffs were not employed by the defendant and that the defendant qualified for the small business exception in that the defendant did not employ migrant workers for more than 500 man-hours during the preceding year. The plaintiffs argued that the contractor and defendant were joint employers, subjecting the defendant to MSAWPA. The court held that the defendant was not a joint employer subject to MSAWPA because (1) the defendant did not control the work of harvesting, (2) could not modify the employment conditions of the workers, (3) did not pay the workers, and (4) did not prepare the payroll. The defendant's control over the per box rate and selection of the fields to be picked were held insufficient to make the defendant a joint employer. In dicta, the court stated that the defendant did not qualify for the small business exception because the defendant failed to provide sufficient work records to demonstrate the number of man-hours performed by migrant workers in the previous year. **Charles v. Burton, 857 F. Supp. 1574 (M.D. Ga. 1994)**.

The plaintiff was a migrant farm laborer who harvested melons on the defendants' farms. The plaintiff was hired by a registered farm labor contractor who was hired by one of the defendants. The other defendant did not hire the contractor nor did that defendant hire the plaintiff. The plaintiff was injured while riding in a truck owned and driven by the contractor and filed suit for violations of MSAWPA, including wage and recordlkeeping violations and vehicle safety violations. The defendants argued that they were not agricultural employers covered by MSAWPA because they did not hire the plaintiff nor were they joint employers because the plaintiff's work was under the primary control of the contractor. The court held that the defendants were not subject to MSAWPA because the contractor had complete control over the plaintiff's work and the plaintiff was hired solely by the contractor. The plaintiff also asserted that one defendant failed to insure that the contractor had registered the truck involved in the accident. The court held that the defendant had taken reasonable steps to determine that a bus used by the contractor for transporting workers was registered but was under no duty to insure that all vehicles which could be used by the contractor were safe. **Ricketts v. Vann, 32 F.3d 71 (4th Cir. 1994)**.

PEANUTS. The CCC has adopted as final the 1994 peanut crop national support level of $678.36 per short ton for quota peanuts and $132.00 per short ton for additional peanuts. The minimum CCC export sale price for additional edible peanuts is $400 per short ton. **59 Fed. Reg. 47528 (Sept. 16, 1994)**.

WOOL. The CCC has issued interim regulations providing that in determining net proceeds for shorn wool and mohair, marketing charges for commissions, curing or grading are not to be deducted, effective for 1993 and later marketing years. The interim rules also remove the 1 percent assessment on 1993, 1994, and 1995 marketings. **59 Fed. Reg. 47530 (Sept. 16, 1994)**.

FEDERAL ESTATE AND GIFT TAX

GENERATION SKIPPING TRANSFERS-*ALM* § 5.04[6].* In 1963, a decedent's will established a trust for the decedent's sister's son. The son was a cotrustee with two other family members but could not exercise any authority over discretionary income or principal distributions. The two other trustees exercised their discretionary powers to distribute the trust principal to a new trust which was identical to the old trust except that the situs of the trust was changed to Illinois where all the other aspects of the trust were located. The IRS ruled that the distribution to the new trust would not subject either trust to GSTT. **Ltr. Rul. 9438023, June 27, 1994**.

IRA. The taxpayers, husband and wife, entered into an agreement under which an IRA held in the name of the husband only and which was community property was split into two IRAs, one for each spouse. For each trust, the other spouse was named as primary beneficiary and a trustee was named as secondary beneficiary of the IRA. The trustee had the power to allocate trust funds to two trusts, a marital trust and an unified credit trust. Upon the death of the first spouse to die, the surviving spouse intended to disclaim the beneficiary portion of the IRA which would pass to the trusts as allocated by the trustee. The IRS ruled (1) the partition of the IRA would not be a taxable distribution, (2) the partition of the IRA would not be a taxable gift, and (3) the portion of the first deceased spouse's IRA disclaimed by the surviving spouse which passed to the unified credit trust would not be included in the surviving spouse's estate. **Ltr. Rul. 9439020, July 7, 1994**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* The taxpayers, husband and wife, each established a revocable trust. The husband was the beneficiary of his trust and the wife was the beneficiary of her trust. Both parties were cotrustees of the trusts but each grantor could act separately as to his or her own trust. At the death of a grantor, that grantor's trust was to be split into three trusts: (1) a trust for the surviving spouse and the grantor's descendants funded with sufficient property to make full use of the unified credit amount, (2) a marital trust for the surviving spouse for which a QTIP election was made and (3) a marital trust for the surviving spouse for which a QTIP election was not made. If the surviving spouse disclaimed any of the second trust, the disclaimed portion was to be included in the first trust. The surviving spouse was to receive all the net income of the second and third trusts and has a testamentary power of appointment of the trust principal. The trustee of the second and third trusts had the power to distribute principal to the surviving spouse for the spouse's health, education, support and maintenance and the spouse had the power to withdraw up to the greater of 5 percent of the trust principal or $5,000 annually on a noncumulative basis. The IRS ruled that the second trust would qualify for the marital deduction if the QTIP election was made and the first trust would not be included in the estate of the surviving spouse. **Ltr. Rul. 9438020, June 27, 1994**.

TRANSFERS WITHIN THREE YEARS OF DEATH-*ALM* § 5.02[2].The decedent signed a power of attorney appointing a son as attorney-in-fact. The decedent made many gifts and other estate planning transactions up to the period of incompetency in March 1987. The son made several gifts from the decedent's property until the decedent's death in April 1987. In 1992, the state passed a law authorizing attorneys-in-fact to make gifts in accordance with the principal's history of lifetime gifts. The court held that the state law applied retroactively and held that the late transfers were not included in the decedent's gross estate as revocable transfers. **Est. of Ridenour v. Comm'r, 94-2 U.S. Tax Cas. (CCH) ¶ 60,180 (4th Cir. 1994), *aff'g,* T.C. Memo. 1993-41**.

FEDERAL INCOME TAXATION

C CORPORATIONS

NET OPERATING LOSSES. The taxpayer/debtor corporation acquired another corporation in order to obtain a group of department stores to add to a national chain of department stores. The debtor operated the new stores for three years and then liquidated the acquired corporation. The stores were operated for three more years before the stores were sold. The debtor made use of net operating losses of the acquired corporation after liquidating the acquired corporation but the IRS disallowed the losses under I.R.C. §§ 269, 382. The court held that the net operating losses would be allowed because the debtor did not have a tax avoidance purpose in acquiring the corporation and continued in the same business as the acquired corporation. **Matter of Federated Dept. Stores, Inc., 170 B.R. 331 (S.D. Ohio 1994), *aff'g,* 135 B.R. 962 (Bankr. S.D. Ohio 1992)**.

STOCK INVERSIONS. The IRS has announced that it will issue regulations governing the tax consequences of stock inversion between related corporations. The new regulations are include either (1) recognition of gain from the exchange of stock or (2) reduction in basis of the exchanged stock, to eliminate the tax benefits from a stock exchange between related corporations. **Notice 94-93, I.R.B. 1994-41**.

CASH TRANSACTIONS. The IRS has issued proposed regulations governing the presumption of ownership of large amounts of cash or cash equivalents where the owner is not otherwise identified. The proposed regulations also add several items to the definition of cash equivalents. **59 Fed. Reg. 49613 (Sept. 29, 1994)**.

CASUALTY LOSSES-*ALM* § 4.05[1].* The taxpayer corporation operated several timberlands which were infected with southern pine beetles. Although the beetles were always present in the timberlands, in several tax years, the beetles caused major damage to the taxpayer's timber. The court held that because an infestation of beetles can kill a tree within days, the infestation at epidemic proportions was a deductible casualty loss. The court held, however, that the taxpayer was not entitled to any deduction because the taxpayer's records were insufficient to prove the amount of loss. The taxpayer also had several forests destroyed by fires and one tract destroyed by the eruption of Mount St. Helens. The court held that the fires and eruption were casualty events allowing the taxpayer a deduction for the

loss of trees. **Weyerhaeuser Co. v. U.S., 94-2 U.S. Tax Cas. (CCH) (Fed. Cl. 1994)**.

COURT AWARDS AND SETTLEMENTS-*ALM* § 4.02[14].* The taxpayer's employment was terminated and the company offered the taxpayer a higher termination settlement if the taxpayer signed a release of all claims against the company. The taxpayer signed the release and sought to exclude the settlement payment as a personal injury settlement payment. The court held that because the release involved all claims against the company, the taxpayer could not show that the settlement was received for any injury to the taxpayer and the settlement must be included in the taxpayer's taxable income. **Taggi v. U.S., 94-2 U.S. Tax Cas. (CCH) ¶ 50,470 (2d Cir. 1994), *aff'g*, 835 F. Supp. 744 (S.D. N.Y. 1993)**.

The taxpayers were commercial salmon fishers who reached a settlement with Exxon Corp. for damages resulting from the Exxon Valdes oil spill. The court held that the settlement proceeds were includible in the taxpayers' gross income because the proceeds did not compensate the taxpayers for personal injuries. **Every v. Comm'r, 94-2 U.S. Tax Cas. (CCH) ¶ 50,478 (W.D. Wash. 1994)**.

DEDUCTIONS. Readers should note that the deduction for 25 percent of health insurance costs by self-employed persons expired after 1993 and has not yet been extended for 1994.

DEPRECIATION. The IRS has adopted as final regulations governing the election for maintaining general asset accounts for groups of depreciable assets for the purpose of claiming depreciation for the assets in each account. The final regulations make several changes in the eligibility requirements for general asset accounts and are effective for assets placed in service in taxable years ending on or after October 7, 1994. **59 Fed. Reg. 52350 (Oct. 8, 1994)**.

HOBBY LOSSES-*ALM* § 4.05[1].* The taxpayers operated a cattle farm in addition to other employment. The court held that the taxpayers could not deduct any expenses in excess of farm income because the farm was not operated with the intent to make a profit. The court cited the taxpayer's lack of experience in cattle farming, the lack of separate business records, the lack of sales and the taxpayer's small amount of time spent on the business. The taxpayers were also not allowed deductions for the costs of rehabilitating some buildings which were to be rented to others because the rental business was still in the development stage. **Lombard v. Comm'r, T.C. Memo. 1994-154**.

PASSIVE ACTIVITY LOSSES-*ALM* § 4.05[3].* The IRS has adopted as final regulations governing the definition of "activity" for purposes of applying the limitation on passive activity losses and credits. The regulations are a substantial revision of the temporary regulations previously issued, *Temp. Treas. Reg. § 1.469-4T*. The regulations are effective only for taxable years ending on or after May 10, 1992, although a taxpayer may elect to apply the temporary election rules for any taxable year which included May 10, 1992.

A trade or business activity is defined as a trade or business as defined in I.R.C. § 162, an activity conducted in anticipation of the commencement of a trade or business, and an activity involving research or experimental expenditures deductible under I.R.C. § 174. A trade or business activity does not include rental activities treated under Temp. Treas. Reg. § 1.469-1T(e)(3)(vi)(B) as incidental to holding property for investment. **Treas. Reg. § 1.469-4(b)(1)**.

One or more trade or business activities or rental activities may be grouped as a single activity if the activities constitute an economic unit for the measurement of gain or loss under I.R.C. § 469. In determining whether activities may be grouped together, a taxpayer may use any reasonable method of applying the relevant facts and circumstances. The regulations provide a nonexclusive list of factors for grouping activities:

(1) similarities and differences in the types of businesses;
(2) extent of common control;
(3) extent of common ownership;
(4) geographical location; and
(5) interdependence of the activities.

Treas. Reg. § 1.469-4(c)(2).

A rental activity may not be grouped with another trade or business activity unless (1) either activity is insubstantial in relation to the other or (2) each owner of the trade or business has the same proportionate ownership in the rental activity, in which case only the rental activity with the trade or business may be grouped with the trade or business. **Treas. Reg. § 1.469-4(d)(1)**. A rental activity involving real property may not be grouped with a rental activity involving personal property, except where the rental of personal property is included in the rental of the real property. **Treas. Reg. § 1.469-4(d)(2)**.

A limited partner may not group an activity described in I.R.C. § 465(c)(1) or in a revenue procedure issued under the proposed regulations, unless the partner is also a limited partner in the other activity or the grouping is appropriate under the facts and circumstances test. **Treas. Reg. § 1.469-4(d)(3)**.

Activities involving a C corporation, S corporation or partnership are to be grouped by the C corporation, S corporation or partnership first, then the shareholders or partners may make their own groupings based upon their personal involvement with other activities by other entities. **Treas. Reg. § 1.469-4(d)(3)**.

Once activities have been grouped together for purposes of the passive activity rules, the activities may not be regrouped unless the original grouping was inappropriate or a material change makes the original grouping inappropriate. **Treas. Reg. § 1.469-4(e)(2)**. **59 Fed. Reg. 50485 (Oct. 4, 1994)**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

ACCOUNTING METHOD. The IRS has adopted as final regulations describing the the events which trigger the recapture of LIFO benefits under I.R.C. § 1363(d) when a C corporation elects to become an S corporation or to merge with an S corporation in a tax-free reorganization. **59 Fed. Reg. 51105 (Oct. 7, 1994), adding Treas. Reg. § 1.1363-2**.

ELECTION. The corporation's Subchapter S election was not allowed because the shareholders failed to prove the timely mailing of a complete Form 2553 or receipt by the IRS. The form was also incomplete in that it had no attached written consent by all shareholders and the form was not signed by all shareholders. The shareholders were assessed penalties for negligence for claiming deductions from the corporation losses before receiving notice that the Subchapter S election was approved. **Huff v. Comm'r, T.C. Memo. 1994-477**.

SOCIAL SECURITY TAX. The Social Security Domestic Employment Reform Act of 1994 has been passed and signed into law increasing to $1,000 (to be adjusted annually for inflation) the annual wage threshold for reporting and paying social security taxes.

NEGLIGENCE

OPEN AND OBVIOUS. The plaintiff was injured while working as a grain inspector inspecting grain in the defendant's grain storage facility. The plaintiff tripped on a tarpaulin used to catch scattered grain from a conveyor. The jury had awarded the plaintiff damages but the trial court entered judgment NOV for the defendant based on its interpretation of a recent Mississippi Supreme Court decision, *McGovern v. Scarborough, 566 So.2d 1225 (Miss. 1990)*, that an open and obvious danger is a complete defense to a negligence claim on that danger. The court held that *McGovern* did not hold that an open and obvious danger was a complete defense to negligence but that comparative negligence was the standard to be applied. Because the jury found some negligence by the defendant, the jury award should have been allowed. **Tharp v. Bunge Corp., 641 So.2d 20 (Miss. 1994)**.

PRODUCT LIABILITY

FUNGICIDE. The plaintiff was a watermelon grower who purchased a fungicide manufactured by the defendant for use on the melons. After the fungicide was applied, the melons suffered burns and became unmarketable. The plaintiff sued for negligence for failure to warn about the burning, breach of express warranty, and strict liability. The defendant argued that the claims were preempted by FIFRA because the claims were all based on a failure of the label to warn about the possible burning of plants. The court held that the breach of warranty and strict liability claims were not preempted by FIFRA because the claims were based on the defective nature of the fungicide in failing to work without harming the melons. The plaintiff argued that the negligence for failure to warn claim was not preempted by FIFRA because the claim was based on the failure of the defendant to warn about the burning once a history of problems arose, even when the fungicide was applied according to the label instructions. The court held that precedents had established that any claim based on failure to warn was preempted by FIFRA; therefore, the negligence claim was not allowed. **ISK Biotech Corp. v. Douberly, 640 So.2d 85(Fla. Ct. App. 1994)**.

SECURED TRANSACTIONS

PRIORITY. The plaintiff bank loaned money to the debtor to purchase cattle from the defendants who also took a note for a portion of the purchase price. An agreement between the parties stipulated that the bank would have a priority security interest in the cattle. The bank filed its security interest first. During the loan period, the bank loaned additional money to the debtor until the debtor filed for bankruptcy. The bank obtained the cattle from the bankruptcy trustee and sold them. The defendant argued that it had a priority security interest in the cattle proceeds because the additional money loaned by the bank to the debtor extinguished the original loan covered by the security agreement with the bank. The District Court had held that the after-acquired property clause of the security agreement was sufficient to continue the security interest in the cattle as to the additional amount loaned to the debtor. The appellate court disagreed but held that a clause in the agreement stating that the security agreement "is to secure payment and performance of the liabilities and obligations of debtor to secured party of every kind and description due or to become due, now existing or hearafter arising," was sufficient to extend the security interest to future advances. **Farmers Nat'l Bank v. Shirey, 878 P.2d 762 (Idaho 1994)**.

STATE REGULATION OF AGRICULTURE

ADMINISTRATIVE INSPECTIONS. The defendant challenged the authority of the Maine Department of Agriculture, Food and Rural Resources to conduct warrantless inspections of the defendant's potato packing operation pursuant to Me. Rev. Stat. § 956. The defendant agreed that the first two tests of *New York v. Burger, 482 U.S. 691 (1987)* were met but argued that the third test was not met because the inspection program lacked sufficient safeguards. The court held that the inspection program had sufficient safeguards in limiting the time, place and manner of the inspections. The court held that the unlimited number of inspections was important to the ability of the program to enforce its requirements. The court noted that the inspection program had been in place for over 60 years without problems and that Maine potato packers have long been on notice that they were subject to random warrantless searches without notice. **State v. McGillicuddy, 646 A.2d 354 (Me. 1994)**.

BEES. The defendant maintained an artificial beehive on the defendant's property. A state wildlife officer visited the defendant and confirmed that an artificial beehive was kept on the property and requested that the defendant register the beehive with the state under Ohio Code § 909.01(D). When the defendant failed to register, the officer obtained a search warrant to inspect the hive, finding some dead bees and the presence of tracheal mites. The defendant was fined $10 and assessed the $5 registration cost and other court costs. The defendant argued that the statute did not apply because the bees were not kept for commercial purposes; therefore, the registration was not a proper exercise of the state's police power. The court held that because bees were an important element of the agricultural process, the registration of beehives, commercial and noncommercial, was a valid exercise of the state's police power. **State v. Williamson, 638 N.E.2d 169 (Ohio Ct. App. 1994)**.

AGRICULTURAL LAW PRESS
P.O. BOX 5444
MADISON, WI 53705-5444

CONSERVATION. The plaintiff was a farm corporation which had entered a portion of its farmland in the federal Conservation Reserve Program (CRP) and established a tree farm on the CRP acres. After the tree farm was established, Missouri enacted the Wildlife Habitat Improvement Program (WHIP) which provided for additional funds for conservation practices instituted by land owners. The WHIP and CRP programs overlapped such that landowners could obtain funds from both programs for the same conservation practice. The plaintiff applied for funds from WHIP for a portion of the costs of establishing the tree farm, but the application was denied by the county water conservation district because the plaintiff did not incur any costs after the WHIP was instituted. The plaintiff argued that the application should have been approved because all statutory requirements were met and the district had no discretion to deny the application. The court held that under the state soil and water commission's regulations, the district had the authority to deny the application if the funds were to be used for past expenses. The plaintiff argued that the regulation requirement was contrary to the statutory authority of the commission to issue regulations. The court held that the statute gave the commission broad powers to promulgate regulations implementing the statutory program. **State v. Scott, 880 S.W.2d 908 (Mo. Ct. App. 1994)**.

CITATION UPDATES

Hendricks v. Comm'r, 32 F.3d 94 (4th Cir. 1994), *aff'g,* T.C. Memo. 1993-396 (hobby losses) see p. 142 *supra*.

Est. of Klosterman v. Comm'r, 32 F.3d 402 (9th Cir. 1994), *aff'g,* 99 T.C. 313 (1992) (special use valuation) see p. 116 *supra*.

ISSUE INDEX