FOOTNOTES

[1] See Harl, **The Farm Debt Crisis of the 1980s** chs. 1, 2 (1990).

[2] Burnet v. S.&L. Bldg. Corp., 288 U.S. 406 (1933). See Lucas v. Schneider, 47 F.2d 1006 (6th Cir. 1931), *cert. denied*, 284 U.S. 622 (1931); Metropolitan Properties Corp. v. Comm'r, 24 B.T.A. 220 (1931); Waldrep v. Comm'r, 52 T.C. 640 (1969), *aff'd*, 428 F.2d 1216 (5th Cir. 1970); Republic Petroleum Corp. v. U.S., 613 F.2d 518 (5th Cir. 1980).

[3] Stonecrest Corp. v. Comm'r, 24 T.C. 659 (1955), *nonacq*., 1956-1 C.B. 6; United Pacific Corp. v. Comm'r, 39 T.C. 721 (1963); Est. of Lamberth v. Comm'r, 31 T.C. 302 (1958). See Hunt v. Comm'r, 80 T.C. 1126 (1983) (same result even with use of "wrap around indebtedness).

[4] Voight v. Comm'r, 68 T.C. 99 (1977), *aff'd*, 614 F.2d 94 (5th Cir. 1980). See Wacker v. Comm'r, T.C. Memo. 1980-324.

[5] Ltr. Rul. 7814001, Dec. 29, 1977).

[6] Cox v. U.S., 585 F. Supp. 811 (W.D. Tenn. 1984).

[7] Temp. Treas. Reg. § 15A.453-1(b)(3)(ii).

[8] Professional Equities, Inc. v. Comm'r, 89 T.C. 165 (1987), *acq*., 1988-2 C.B. 1; Webb v. Comm'r, T.C. Memo. 1987-451 (same).

[9] Professional Equities, Inc., *supra* note 8.

[10] I.R.C. § 357(c). See Owen v. Comm'r, 881 F.2d 832 (9th Cir. 1989) (liabilities secured by personal guarantee for which guarantors remained liable not excluded). See also Ltr. Rul. 8331035, April 28, 1983 (upon incorporation of farm partnership by two equal partners, each would recognize gain to extent their respective shares of partnership liabilities exceeded the adjusted basis of their respective interests in the partnership); Ltr. Rul. 8331036, April 28, 1983 (same).

[11] Beaver v. Comm'r, T.C. Memo. 1980-429.

[12] 872 F.2d 519 (2d Cir. 1989), *rev'g*, 85 T.C. 824 (1985).

[13] Rev. Rul. 68-629, 1968-2 C.B. 154.

[14] See note 12 *supra*.

CASES, REGULATIONS AND STATUTES

ANIMALS

CATTLE. The plaintiff was injured by a cow when the plaintiff moved a two-hour old calf of the cow from a muddy bank of a river. The defendants were the daughter of the plaintiff and her husband who owned the cow and land. The court held that any negligence by the plaintiff would not bar recovery but would reduce the plaintiff's recovery and because of the plaintiff's experience with cows which should have indicated that a cow with a newborn calf could be dangerous, the plaintiff was 80 percent negligent in failing to secure the cow before attempting to move her calf. **Andrade v. Shiers, 564 So.2d 787 (La. Ct. App. 1990)**.

BANKRUPTCY

GENERAL

AVOIDABLE LIENS. The Chapter 7 debtor claimed an exemption for a homestead against which a judgment lien was held by a creditor. The debtor petitioned for avoidance of the judgment lien as impairing the homestead exemption. The creditor argued that the judgment lien did not impair the exemption because under Florida law, Fla. Const. Art. X, § 4, a judgment lien cannot attach to homestead property. The court held that although the judgment lien does not attach to homestead property, the recording of the judgment can operate as a cloud on the debtor's title to the homestead and that this cloud on the title is an impairment of the homestead exemption sufficient for avoidance under Section 522(f). ***In re* Watson, 116 B.R. 837 (Bankr. M.D. Fla. 1990)**.

EXEMPTIONS. The debtor's homestead was sold to satisfy a federal tax lien. The court held that the debtor was entitled to claim an exemption for the amount of the proceeds left after satisfaction of the tax lien. **Matter of Clark, 116 B.R. 672 (Bankr. W.D. Wis. 1989)**.

Prior to filing for bankruptcy, the debtor had received a lump sum disability check which was deposited in a new bank account. The debtor's income consisted of social security payments, pension payments and AFDC payments for a minor ward. All income was used for expenses, with withdrawals from the bank account required to meet these expenses. The court held that the debtor was entitled to exempt the bank account funds under Section 522(d)(10) as disability benefits. ***In re* Frazier, 116 B.R. 675 (Bankr. W.D. Wis. 1990)**.

A Chapter 7 debtor claimed an interest in a homestead as exempt. The debtor's spouse was not a debtor in the case. At the time the house was purchased, the debtor had several debts outstanding and used money borrowed from a cousin who was an unsecured creditor in the case. The court held that because the trustee could not reach the nondebtor spouse's interest, the trustee could not reach the debtor's interest in the homestead because under Iowa law, the homestead was not divisible by creditors, even where the debtor spouse had antecedent debts at the time the homestead was purchased. **Matter of Tyree, 116 B.R. 682 (Bankr. S.D. Iowa 1990)**.

Three months prior to filing bankruptcy, the debtors used $5,000 from a savings account to purchase two IRA accounts which are exempt under Fla. Stat. § 222.21. The trustee objected to the exemption arguing that the purchase of the IRA's was an attempt to defraud creditors. The court held that the debtors had a right to convert non-exempt property to exempt property prior to filing for bankruptcy. ***In re* Horath, 116 B.R. 835 (Bankr. M.D. Fla. 1990)**.

The debtors' interests in ERISA qualified pension plans were excluded from bankruptcy estate property under Section

541(c)(2) because ERISA was applicable nonbankruptcy law which restricted the transfer of the pension plan funds. ***In re* Moore, 907 F.2d 1476 (4th Cir. 1990)**.

JURISDICTION. The debtor was the sole owner and principal officer of a corporation which owned a restaurant. The corporation and the debtor were assessed for delinquent state taxes. The corporation unsuccessfully appealed the assessments but the debtor did not join in the appeals. The debtor then raised in the bankruptcy case the issue of the personal liability for the taxes owed by the corporation. The court held that because the debtor's personal liability arose directly from the corporation's liability for the taxes, the court was prevented by Section 505 from determining the debtor's liability for taxes which had been determined by the administrative appeals. ***In re* Galvano, 116 B.R. 367 (Bankr. E.D. N.Y. 1990)**.

SETOFF. The Commodity Credit Corporation (CCC) owed the debtor amounts from overpayment of redemption of cotton. The debtor owed the CCC for underpayment of redemption of cotton and owed the Agricultural Marketing Service (AMS) for cotton classing services. The CCC was allowed to set off the amounts. The court held that the debts had mutuality of parties because the CCC and AMS were both"part of the federal government." ***In re* Julien Co., 116 B.R. 623 (Bankr. W.D. Tenn. 1990)**.

TRUSTEE SALE OF ESTATE PROPERTY. The debtor and the nondebtor spouse owned a residence as tenants by the entirety. The trustee argued that the residence may be sold with the nondebtor spouse to receive half of the proceeds and the bankruptcy estate to receive the other half. Under Vermont law, the interest of a tenant by the entirety may not be reached by the sole creditor of the other tenant. The court held, therefore, that the trustee could not sell the residence unless there is a joint creditor of the debtor and nondebtor spouse making a claim in the bankruptcy case. Because the only joint creditor did not file a claim in the debtor's case, the trustee had no power to require the sale of the residence. ***In re* Cerreta, 116 B.R. 402 (Bankr. D. Vt. 1990)**.

UTILITY SERVICE. An electric utility company was allowed to require, after 20 days after the filing of the bankruptcy petition, the debtors to pay a security deposit as a condition of continued service although the electric company did not otherwise require security deposits from its customers. ***In re* Hanratty, 907 F.2d 1418 (3rd Cir. 1990), *aff'g* 107 B.R. 55 (E.D. Pa. 1989)**.

CHAPTER 7

DISMISSAL. The Chapter 7 debtor was a farm corporation formed and owned by members of two families. After the death of a director, the relationship between the families deteriorated to the point where the company was unmanageable. The two directors of one family then elected their attorney as a replacement director and the board of directors voted to liquidate the corporation through filing Chapter 7 bankruptcy. The remaining director from the other family petitioned for dismissal, claiming that the decision to file bankruptcy was improperly made under the corporation's bylaws and the filing was made in bad faith. The court held that a vote of the shareholders of the corporation was not required by Idaho law for a corporation to file bankruptcy. The court also held that Chapter 7 bankruptcy would be an method of dissolving the corporation which could safeguard the rights of all shareholders such that dismissal in favor of a state court dissolution was not warranted. **Matter of Quarter Moon Livestock Co., Inc., 116 B.R. 775 (Bankr. D. Idaho 1990)**.

CHAPTER 11

DISMISSAL. The debtors were a corporation owning farmland and the corporation's principal shareholder who managed the farm operations on the corporation's land. The court upheld dismissal of the debtors' Chapter 11 cases where the plan was unfeasible and the debtors had transferred assets without court approval, failed to provide monthly reports and had delayed the case with excessive motions. ***In re* Kerr, 908 F.2d 400 (8th Cir. 1990)**.

SALE OF ESTATE PROPERTY. The debtor corporation operated a hotel as debtor-in-possession and sold the hotel under the provisions of the Chapter 11 plan of reorganization. The debtor claimed exemption of the sale from state gains tax under Section 1146(c) exempting transfers of securities and instruments of transfer from stamp or similar taxes. The court applied the three pronged test of *In re The Baldwin League of Independent Schools, 110 B.R. 125 (S.D. N.Y. 1990)* and held that (1) the gains tax was similar to a stamp tax because the tax was levied only upon gain of a specific transaction; (2) the tax was due when the property was transferred and was a tax upon the delivery of an instrument of transfer; and (3) the transfer was made pursuant to a plan of reorganization. Therefore, the sale of the hotel was exempt from New York gains tax. The court also held that by participating in the bankruptcy case, the State of New York had waived its sovereign immunity under 11 U.S.C. § 106. ***In re* 995 Fifth Ave. Assoc., L.P., 116 B.R. 384 (Bankr. S.D. N.Y. 1990)**.

CHAPTER 12

DISMISSAL. The debtor's Chapter 12 case was dismissed because the debtor was not eligible for Chapter 12 where the debtor had no income and had debts exceeding $1.5 million. The case was also dismissed for bad faith filing and the debtor was prohibited from future filings for two years where the debtor had filed three times in three years, had no income, and filed the current case only to prevent the imminent foreclosure sale of the debtor's property. ***In re* Walton, 116 B.R. 536 (Bankr. N.D. Ohio 1990)**.

ELIGIBILITY. The debtor filed for Chapter 12 one day after the debtor's Chapter 11 case was dismissed. Over 20 percent of the claims against the debtor was a debt owed to the debtor's former spouse as part of a property settlement from their divorce. The court held that the debt owed to the

debtor's spouse arose out of a farming operation because the amount was to be paid in settlement of the former spouse's interest in farm land, machinery, and crops. The court reasoned that the Eighth Circuit Court of Appeals in *In re Easton, 883 F.2d 630 (8th Cir. 1989)*, rejected the "risk" test (requiring eligible debts to arise out of risks from farming) and required only that the debt arise out of farming activities. In addition, because the debt to the former spouse was to be paid over 13 annual installments without interest, the present value of the debt was less than 20 percent of the debtor's debt. The court denied the request to dismiss the case for bad faith because of multiple filings. The court also held that the filing was not barred by the 180 day limitation of Section 109(g) because the prior Chapter 11 case was not dismissed for the willful failure of the debtor to follow court orders. **Matter of Marlatt, 116 B.R. 703 (Bankr. D. Neb. 1990)**.

EXECUTORY CONTRACTS. The Chapter 12 debtors purchased farm land through an assignment of a buyer's interest in a land sales contract. The plan proposed to pay the sellers the current fair market value of the land. The sellers argued that the assignment of the buyer's interest was prohibited by the sales contract and that the contract was an executory contract requiring the debtor to cure all defaults and provide assurance of future performance under the contract. The court held that under Nebraska law, a land sales contract was an executory contract and that the plan payments were insufficient because the payments did not cure the debtors' defaults. The court also held that the anti-assignment clause in the agreement was unenforceable. **Matter of Heartline Farms, Inc., 116 B.R. 694 (Bankr. D. Neb. 1990), *amended* 116 B.R. 700 (Bankr. D. Neb. 1990)**.

The Chapter 12 debtor purchased farmland under a contract for deed providing for installment payments for 26 years with the deed held in escrow. In the contract were two clauses, one for damages caused by the seller if the seller conducts any drilling operations in exploration of reserved mineral rights, and one for subordination of the seller's interests in the contract to a lender of the buyer to the extent of $100,000. The court held that neither of these clauses were executory in that no exploration of the seller's mineral rights had been made and loans were not made to the buyer. In addition, neither clause affected the seller's or buyer's rights as to the sale of the land. Therefore, the contract was not executory and the court denied the creditor's motion to have the debtor assume or reject the contract. ***In re* Highland Acres, Inc., 116 B.R. 783 (Bankr. D. Mont. 1990)**.

FEDERAL TAXATION

AUTOMATIC STAY. The debtor filed for Chapter 7 in December 1988. Prior to the filing, the IRS prepared a "substitute for return" for the debtor's taxable years 1983, 1984 and 1985, for which the debtor failed to file tax returns. Based upon unpaid tax liabilities determined from these returns, the IRS levied against the debtor's army pension. The IRS notified the army of the release of the levy promptly after the debtor filed for bankruptcy but received one month's payment from the pension after the bankruptcy filing. The court held that IRS preparation of the debtor's tax returns did not relieve the debtor of the debtor's responsibility for filing a return for purposes of the dischargeability of the taxes owed from those returns under Section 523(a)(1)(B)(i). The court also held that the IRS did not violate the automatic stay when it received the one month payment from the pension and failed to turn the payment over to the debtor, because the taxes were not dischargeable and the IRS took no action after the bankruptcy filing. ***In re* Chastang, 116 B.R. 833 (Bankr. M.D. Fla. 1990)**.

DISCHARGE. The debtors' Chapter 13 plan listed the debtors' liability for federal employment taxes but the IRS failed to file a proof of claim for those taxes. The court held that because the IRS failed to timely file a proof of claim for those taxes, the debtors would receive a discharge of those taxes without paying for them under the plan. **Matter of Border, 116 B.R. 588 (Bankr. S.D. Ohio 1990)**.

The IRS assessed taxes against the debtor in September 1987, and the debtor filed Chapter 7 bankruptcy in March 1988. The debtor was granted a discharge in September 1988 and filed a Chapter 13 petition in February 1989. Thus, the taxes were assessed 329 days before the filing of the Chapter 13 petition and the debtor claimed the taxes were dischargeable under Section 507(a)(7)(A) as being assessed more than 240 days before the Chapter 13 petition. The court held that under I.R.C. § 6503(b), the Chapter 7 case tolled the statute of limitations on collection of the taxes during the case and for six months thereafter. Because the Chapter 13 case was filed within six months after the end of the Chapter 7 case, the taxes were nondischargeable. ***In re* Dietz, 116 B.R. 792 (D. Colo. 1990), *rev'g* 106 B.R. 236 (Bankr. D. Colo. 1989)**.

The IRS assessed penalties on taxes which were due more than three years before the taxpayers filed for bankruptcy. The court held that under Section 523(a)(7)(B), the penalties were dischargeable. ***In re* Roberts, 90-2 U.S. Tax Cas. (CCH) ¶ 50,484 (10th Cir. 1990), *aff'g unrep. D. Ct. dec., aff'g* 94 B.R. 707 (Bankr. N.D. Okla. 1989)**.

NET OPERATING LOSSES. The debtor filed for Chapter 11 in 1976 and the case was eventually converted to Chapter 7 with the debtor finally being denied discharge in 1987 for concealment of assets and documents. During the years of the case, the trustee filed estate tax returns which used net operating loss carryforwards from the debtor's taxable years before bankruptcy. The court held that the trustee could use the net operating loss carryforwards because of the long life of the case caused by the actions of the debtor; the lack of harm to the debtor's fresh start because of the denied discharge; and the value of the carryforwards to the estate which had generated considerable income. The court discussed *Segal v. Rochelle, 382 U.S.375 (1966)*, which did not hold that loss carryforwards were estate property but noted that denial of the carryforwards to the debtor might harm the debtor without a corresponding benefit to the estate. Thus, the present case also fails to clearly decide who is entitled to any carryforwards from the debtor's pre-

bankruptcy taxable years. Note: The case was decided in the context of the carryforwards as estate property. Under I.R.C. § 1398(j)(2)(A), the estate succeeds to the net operating loss carryovers of the debtor. ***In re* Berry, 116 B.R. 808 (D. Kan. 1990)**.

CONTRACTS

DAMAGES. The plaintiffs purchased seed potatoes from the defendants which were infected with ring rot and which contaminated the plaintiffs' machinery causing other plantings of potatoes to become infected with ring rot. Under state law, all of the fields with infected potatoes could not be certified as seed potatoes and the plaintiffs were required to sell the potatoes as lower priced eating potatoes. The plaintiffs sued for damages to the other potatoes under the tort theories of misrepresentation and negligence. The court held that because the sale of the seed potatoes was a commercial transaction, the U.C.C. controls to limit damages to the loss of the product sold. **Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990), *aff'g*, 431 N.W.2d 907 (Minn. App. 1988)**.

DECEPTIVE PRACTICES. The plaintiffs purchased an interest in a cow which the defendant/seller represented to be an embryo donor cow capable of producing multiple embryos for impregnating host cows. The cow was pregnant at the time of purchase. The cow delivered a stillborn calf and despite several attempts, was later determined unable to produce multiple embryos because of unknown causes. The plaintiffs had borrowed the money to purchase the interest in the cow and the loan was guaranteed by the defendant/seller. The plaintiffs defaulted on the loan and the defendant was required to pay the balance of the loan with interest. The plaintiffs sued for damages under the Texas Deceptive Trade Practises Act, Tex. Bus. & Com. Code §§ 17.41-17.63. The defendant/seller counter-claimed for the amount paid under the guarantee. The court upheld judgment for the plaintiffs and held that the seller's misrepresentation as to the ability of the cow to produce multiple embryos was not to be determined only as of the date of sale and that the failure of the cow to produce multiple embryos was evidence of misrepresentation. The court held that the plaintiffs did not need to prove the seller's intent to deceive. **Teague v. Bandy, 793 S.W.2d 50 (Tex. Ct. App. 1990)**.

STATUTE OF LIMITATIONS. The plaintiffs purchased a milking machine system in 1976. Over the course of eight years, the plaintiffs' dairy cows suffered mastitis, loss of productivity and eventual death while the plaintiffs sought the cause of the problems. IN 1984 it was determined that improper installation of the milking system caused the problems and brought the present action in negligence in design, installation and maintenance of the system and breach of express and implied warranties. The court held that the action was governed by the U.C.C. statute of limitations of four years from the date of delivery of the milking system, because the sale was predominantly one for a sale of goods. **Houghton v. Alfa-Laval, Inc., 459 N.W.2d 42 (Mich. Ct. App. 1990)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS. The Eighth Circuit Court of Appeals, sitting en banc with two justices dissenting, held that the Agricultural Credit Act of 1987 does not provide an implied private right of action for farmer-borrowers. The Eighth Circuit has now joined the Ninth and Tenth Circuits in rejecting a private right of action. **Zajac v. Federal Land Bank of St. Paul, 909 F.2d 1181 (8th Cir. 1990)**.

The plaintiff sued the FmHA for lost profits from failure of the FmHA to properly process a farm operating loan. The court held that the plaintiff provided sufficient evidence of the amount of lost profits to prevent a summary judgment for FmHA. **Goolsby v. U.S., 21 Cl. Ct. 88 (1990)**.

BRUCELLOSIS. The APHIS has issued proposed rules amending the brucellosis regulations to (1) allow movement of cattle from approved intermediate handling facilities to quarantined feedlots; (2) require approved intermediate handling facilities to be separate and apart from livestock facilities for breeding cattle and bison, rather than from all other livestock facilities; (3) change the allowable minimum number of live organisms in official calfhood vaccines; (4) expand the conditions under which the standard card test may be used as an official test; (5) allow reinstatement of "certified free herd" status after a reactor is found, if sufficient evidence shows that the reactor's herd is not infected with *Brucella abortus*; (6) remove the adjusted MCI reactor rate as a standard for Class Free states; and (7) provide for interstate movement of rodeo bulls on the basis of a single annual test. **55 Fed. Reg. 39004 (Sept. 24, 1990)**.

CROP INSURANCE. The FCIC has issued a proposed rule under the forage seeding crop insurance regulations establishing cancellation and termination dates for counties in New Hampshire, Pennsylvania and Vermont. **55 Fed. Reg. 38693 (Sept. 20, 1990)**.

The FCIC has issued a proposed rule under the beet crop insurance regulations to (1) correct planting dates and clarify the insurance period in California, (2) change the end of insurance period for Texas, and (3) change the definition of crop year in California and Texas. **55 Fed. Reg. 38693 (Sept. 20, 1990)**.

FARM LOANS. The FmHA has adopted as final the change of the title of Form FmHA 1960-12 from "Financial Farm Analysis Summary" to "Financial and Production Farm Analysis Summary." **55 Fed. Reg. 37469 (Sept. 12, 1990)**.

The USDA has adopted as final regulations implementing the Debt Collection Act of 1982. **55 Fed. Reg. 38661 (Sept. 20, 1990)**.

PRICE SUPPORTS. The plaintiff was a peanut handler who was assessed a monetary penalty for violation of 7 U.S.C. § 1359(h) for failure to export or crush additional peanuts (peanuts produced in excess of the peanut poundage quota). In a previous decision, the court held that the USDA was not authorized by Section 1359(h) to assess a monetary penalty. *Pender Peanut Corp. v. U.S., 20 Cl. Ct. 447 (1990)*, see p. 156 *supra*. In the present case, the plaintiff sought interest on the amount recovered in the first case. The court held that the payment of interest was not authorized by statute or any contract between the plaintiff and the government. **Pender Peanut Corp. v. U.S., 21 Cl. Ct. 95 (1990)**.

RELENDING PROGRAM. The FmHA has adopted as final amendments to the Intermediary Relending Program regulations to correct miscellaneous problems with implementing the program. **55 Fed. Reg. 38530 (Sept. 19, 1990)**.

SETOFFS. The FmHA has adopted as final amendments to the Internal Revenue Service Offset regulations to include accounts which have been accelerated, are in a collection only status, have a transfer or voluntary conveyance pending, or have a foreclosure pending but have not been referred to the Office of General Counsel. **55 Fed. Reg. 38035 (Sept. 17, 1990)**.

TOBACCO. The 1990 air-cured tobacco national acreage allotment is 4.361 acres and the national poundage quota is 8.8 million pounds. In a referendum producers disapproved marketing quotas on a poundage basis for the 1990-93 marketing years. **55 Fed. Reg. 37725 (Sept. 13, 1990)**.

The CCC has determined the 1991 marketing year price support levels of the following types of tobacco:

	Cents per pound
Virginia fire-cured	126.2
Ky-Tenn. fire-cured	129.7
Dark air-cured	110.7
Virginia sun-cured	111.5
Cigar-filler & binder	96.2
Puerto Rican filler	77.8

55 Fed. Reg. 38713 (Sept. 20, 1990).

TUBERCULOSIS. The APHIS has amended the cattle and bison tuberculosis regulations to raise Ohio from a modified accredited state to an accredited free state. **55 Fed. Reg. 38534 (Sept. 19, 1990)**.

FEDERAL ESTATE AND GIFT TAX

DISCLAIMERS. The surviving spouse received an interest in a trust under the decedent's will and wanted to disclaim a portion of the interest in the trust after having received a small distribution from the trust. The IRS ruled that the disclaimer would be effective, if made within nine months of the decedent's death, because the small distribution could be attributed to the nondisclaimed portion of the trust. **Ltr. Rul. 9036028, June 12, 1990**.

GENERATION SKIPPING TRANSFERS. The decedent's will established a testamentary trust with the decedent's dogs as life beneficiaries with the decedent's issue as remainder beneficiaries. The trustees had the discretion to distribute trust income to the decedent's issue per stirpes, as if the decedent's children were not living, for their education. The IRS ruled that the transfer of property to the trust was a direct skip under I.R.C. § 2612(c)(1). **Ltr. Rul. 9036043, June 13, 1990**.

Note: The following letter ruling was incorrectly identified on p. 181 *supra* as Ltr. Rul. 9035057: The surviving spouse disclaimed an interest in property bequeathed by the decedent who was mentally incompetent on October 22, 1986, and until death. IRS ruled that the passing of the disclaimed interests to the decedent's grandchildren was not subject to GSTT. **Ltr. Rul. 9034057, May 30, 1990**.

MARITAL DEDUCTION. A trust for the decedent's surviving spouse was to be funded with "the balance of the trust estate which will equal the maximum marital deduction allowable for federal estate tax purposes" and provided that the amount passing to the trust was to be decreased by the amount by which the amount of property passing outside of the trust could be increased without incurring federal estate tax. The court held that the funding clause was not a formula clause under ERTA Section 403(e)(3) requiring limiting the marital deduction because the additional trust language expressed the decedent's intent that the surviving spouse receive the largest amount which would not result in federal estate tax. The court also held that its decision in *Est. of Blair v. Comm'r, T.C. Memo. 1988-296* which reached an opposite result on similar facts, was incorrect. **Est. of Levitt v. Comm'r, 95 T.C. No. 22 (1990)**.

On Form 706 the executor did not check the box indicating that a QTIP election was made, did not list in part 2 of Schedule M any estate assets for which a QTIP election was made, and indicated in line A of part 2 of Schedule M that the value of property for which a QTIP election was claimed as "none." The IRS held that the executor failed to make an election to treat an interest in a testamentary trust passing to the surviving spouse as QTIP. **Ltr. Rul 90370003, June 4, 1990**.

SPECIAL USE VALUATION. The IRS has announced that it will not seek certiorari of *Prussner v. U.S., 896 F.2d 218 (8th Cir. 1990)* (perfection of election), see p. 73 *supra*. The IRS will continue to litigate in other circuits the issues raised in *Prussner*. **AOD CC-1990-024**.

This decision resulted from a second hearing on the same issues involved in an earlier decision, see p. 149 *supra*. The decedent's estate filed an estate tax return electing to value

the farmland under the special use valuation method but the return did not contain many of the items required for the election, including (1) identification of the interests of the decedent's daughters in the farmland, (2) identification of the property to be specially valued and (3) identification of the fair market value of the property. After the IRS reviewed the estate tax return, the executor was requested to provide the missing items within 90 days, which the executor failed to do. After appointment of new counsel, the estate asked for a second request from the IRS with an additional 90 days to file a complete election. The IRS made the second request and a complete election was filed within the next 90 days. The court held that because TRA 1986 Section 1421 applied to the specific Form 706 filed by the estate, the second request was the effective request under that section. As to the failure of the return to identify the decedent's daughters' interest in the property, in the first decision, the court held that the daughters did not have sufficient interest in the property to require identification because the daughters held only a residuary interest in the estate property and the surviving spouse intended to elect to receive all of the specially valued property as marital property. In the second hearing, the IRS contended that the marital deduction was incorrect and that the daughters would receive a present interest in some of the farmland. The court held that the special use valuation election was still sufficient as to the property included in the marital deduction but would not be sufficient as to any present interests received by the daughters. As to the failure to identify the specially valued property, in both decisions, the court held that because (1) the estate return does not request identifying information and (2) the supporting schedules provide enough information to identify the specially valued property, the estate tax return provided sufficient information about what property was being specially valued. As to listing the fair market value of the property, in both decisions, the court found that the supporting schedules did identify the fair market value of the property and held that the return provided sufficient information as to the fair market value of the property even though the fair market value was not listed on Schedule N. Thus, the estate was entitled to perfect its election within the 90 days after receipt of the second request for information under Section 1421. **Parker v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 60,028 (E.D. Ark. 1990), *on rehearing*, 90-2 U.S.Tax Cas. (CCH) ¶ 60,038 (E.D. Ark. 1990)**.

TRANSFERS WITH RETAINED INTERESTS. The taxpayer transferred bonds to a ten-year trust with the grantor as beneficiary. At the end of the ten years, the trust corpus is to be distributed to the grantor's children. The bonds had maturity dates of three to 16 years but most of the bonds had six to eight year maturity dates. The grantor and the children entered into an agreement to have all appreciation on the bonds returned to the grantor at the end of the ten years. IRS ruled that the reformed trust corpus was not includible in the taxpayer's gross estate under I.R.C. § 2036(c). However, the reformation of the trust would result in a gift of the appreciation by the children to the grantor. **Ltr. Rul. 9036045, no date given**.

The taxpayer and spouse formed an intervivos irrevocable trust for the benefit of their children and provided for revocable trusts for themselves and for their children funded with stock in a closely-held corporation. The trustee of the irrevocable trust had the power to purchase life insurance policies on the lives of the taxpayer and spouse. The trustee of the irrevocable trust, the taxpayers and the corporation entered into an agreement for the trustee to purchase life insurance on the taxpayers' lives with the trust owning the policies, the corporation paying the premiums and the corporation entitled to receive the amount of premiums paid from the proceeds of the policies, thus designating the corporation as owner of the policies to the extent of the cash surrender value of the policies. The IRS ruled that the insurance purchase arrangement was not an enterprise under I.R.C. § 2036(c). The IRS also ruled that if the policies were purchased within three years of the taxpayers' deaths, the policies will be includible in their estates because the policies were purchased at the request of the taxpayers and through entities controlled or funded by them. **Ltr. Rul. 9037012, June 14, 1990**.

The taxpayers transferred partial interests in improved real property to their children as a taxable gift. The property was leased to a corporation owned in part by one of the taxpayers, with the remainder owned by other family members. The taxpayers and their children formed a limited partnership with the property contributed to the partnership in return for a limited partnership interest. One of the taxpayers contributed cash equal in value to one percent of the value of the real property contributed to the partnership in exchange for a general partnership interest. Under the partnership agreement, (1) the limited partners are not liable for partnership losses exceeding their original contributions, (2) the general partner was to be indemnified by the partnership for losses incurred by the partnership (except those resulting from the general partner's own negligence or misconduct), and (3) the general partner had management rights and was paid a management fee, but the general partner had no control over partnership distributions. The IRS ruled that because the general partner was to be indemnified for excess partnership losses before any appreciation would accrue to the other partners, the transfer of the property from the taxpayers was not a disproportionate transfer of potential appreciation and the property would not be included in the transferors' estate under I.R.C. § 2036(c). **Ltr. Rul. 9037055, June 21, 1990**.

The taxpayers leased unimproved land to a corporation of which the taxpayers owned 51 percent and the taxpayers' children owned 49 percent. The rent was to be the fair market rental with annual adjustments based upon the "cost of living increase." The IRS ruled that the lease was not a retained interest in the property under Section 2036(c)(7). **Ltr. Rul. 9037056, June 21, 1990**.

TRUSTS. Two trusts, each with one beneficiary, owned equipment which was leased to an S corporation in which the beneficiaries were shareholders. The beneficiaries determined that the equipment should be transferred to the corporation in exchange for stock, but because the trusts would not qualify as Subchapter S trusts, the equipment was

to be distributed to the beneficiaries who would then contribute the equipment to the corporation in exchange for stock. The equipment was fully depreciated, the trust would elect not to recognize gain on the distribution, and no DNI would be carried out in the distribution. The IRS ruled that the basis of the distributed property would be the same for the beneficiaries as for the trust before distribution, under I.R.C. § 643(e)(1). Although Section 643 does not have any regulations which address the recapture of depreciation under I.R.C. § 1245(a), the IRS applied the rule of prior regulations, Treas. Reg. 1.661(a)-2(f), to hold that the distribution of the equipment to the beneficiaries did not cause recapture of depreciation under 1245 because the distribution qualifies as a gift under Treas. Reg. § 1.1245-4(a)(1). **Ltr. Rul. 9035046, June 4, 1990**.

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayers were required to pay alternative minimum tax (AMT) in taxable years in which the taxpayers had sufficient deductions and credits to produce negative taxable income. In calculating the AMT, the taxpayers deducted the amount of deductions for which no decrease in tax liability resulted, arguing that the tax benefit rule of Section 58(h) (in effect for the taxable years involved) applied to the AMT. The court rejected this argument because the legislative history of TRA 1986 stated that the tax benefit rule was not to apply to the AMT solely to provide relief for the taxpayer because the taxpayer did not receive any benefit from the tax preference item in computing the regular tax. The court also supported its decision by noting that the AMT has several tax benefit provisions already. **Weiser v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 50,480 (N.D. Calif. 1990)**.

BAD DEBTS. Bad debt deductions were disallowed for advances made by a corporation to a related corporation because the advances were considered capital contributions where the advances were not evidenced by formal debt instruments, no repayment dates were set, no interest charges were established, and some advances were related to the corporation's interest in the related corporation. **Calumet Indus., Inc. v. Comm'r, 95 T.C. No. 21 (1990)**.

C CORPORATIONS

DEBT OR EQUITY. As part of a sale of corporation property, the corporation transferred property to a new corporation in exchange for cash, notes, common stock and preferred stock. The preferred stock was issued in several series with different years for redemption. The redemptions occur sequentially but are not mandatory on the new corporation. The IRS ruled that the stock was equity in that the stock bore no rate of interest, had no fixed maturity date, had cumulative dividends paid at the discretion of the board of directors, were not redeemable without consent of the board, did not give shareholders a remedy for default for failure to declare a dividend, and subordinated the interests of the preferred shareholders to the secured and general creditors of the corporation. The IRS also held that the value and the basis of the preferred stock would be equal to the fair market value of the property contributed to the corporation in exchange for the stock. **Ltr. Rul. 9034002, May 9, 1990**.

EMPLOYEES. Meat pickers at a crab meat processing plant were employees and not independent contractors for purposes of FICA and FUTA withholding where the employer supervised the work, the work was performed only on the employer's premises, the value of the equipment provided by the workers was minimal and the employer could dismiss poor workers. **Breaux & Daigle, Inc. v. U.S., 90-2 U.S. Tax Cas. (CCH) ¶ 50,491 (5th Cir. 1990),** ***aff'g*** **89-2 U.S. Tax Cas. (CCH) ¶ 9536 (D. La. 1989)**.

LIMITATION OF LOSS DEDUCTION. The taxpayers were investors in a computer purchase and lease-back arrangement who had purchased interests in the arrangement with recourse notes. The court held that the taxpayers were not entitled to loss deductions from the arrangement because the taxpayers were not at risk as to the recourse loans because their risk was limited by the inter-relationship of the financial arrangements of the leases. The possibility that the taxpayers would have to personally pay on the notes was limited to the insolvency of one of the parties, a circumstance not shown to be probable by the taxpayers. **Moser v. Comm'r, 90-2 U.S. Tax Cas. (CCH) ¶ 50,498 (8th Cir. 1990),** ***aff'g*** **T.C. Memo. 1989-142**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. A corporation which was a general partner in a partnership filed a petition as a Tax Matters Partner(TMP) challenging a Notice of Final Partnership Administrative Adjustment (FPAA) 92 days after receipt of the FPAA. The corporation also filed a second petition in case it was not an TMP. The court granted the IRS motion to treat the first petition as made by a notice partner and to dismiss the second petition as duplicative. **Amesbury Apartments, Ltd. v. Comm'r, 95 T.C. No. 18 (1990)**.

DEFINITION. The partnership was formed under a state limited partnership act materially corresponding to the Uniform Limited Partnership Act. The partnership will have a general partner which is an S corporation and a limited partner which is a partnership composed of members of one family. Under the partnership agreement, the corporation and family partnership may not transfer interests in the partnership except to the personal representatives of the partners. The corporation is also required to maintain at least a 1 percent interest in all partnership tax items and capital. The IRS ruled that the partnership would be a partnership for federal income tax purposes so long as the partnership agreement restricting transfer of partnership

interests was enforceable under state law. **Ltr. Rul. 9037034, June 27, 1990**.

INVESTMENT TAX CREDIT. The taxpayer resigned as a partner during the partnership taxable year. The court held that the partner was not eligible to claim a share of investment tax credit claimable by the partnership and was liable for recapture of partnership investment tax credit claimed by the taxpayer in previous years. **Weiss v. Comm'r, T.C. Memo. 1990-492**.

TAX BENEFIT RULE. The taxpayers were shareholders in an S corporation. In 1967 the amount of corporation loss allocable to each shareholder exceeded the shareholder's taxable income so that the taxpayers were unable to receive the full tax benefit of the loss deductions. In 1973 the taxpayers' bonds were redeemed with gain realized by the taxpayers. The taxpayers argued that the basis of their stock should be increased to reflect the loss of the tax benefit of losses incurred in 1967. The court held that the tax benefit rule was not available because application of the rule in this case would be inconsistent with the three year limitation on carryforwards of loss under Section 172 in effect for the years involved. In addition, the loss of the tax benefit was not related to the transaction for which the benefit was to be applied because the loss was a corporation loss and the gain was from redemption of bonds. **Hudspeth v. Comm'r, 90-2 U.S. Tax Cas. (CCH) ¶ 50,501 (9th Cir. 1990), *aff'g on point*, T.C. Memo. 1985-628**.

RESPONSIBLE PERSON. The debtor was the president and principal shareholder of a corporation which had failed to pay federal withholding taxes. The IRS filed a claim against the debtor as a "responsible person" for the 100 percent penalty under I.R.C. § 6672. The court held that the IRS had the burden of proof to demonstrate the validity of its claim. The court also held that the debtor was not a responsible person because the control of the corporation's financial affairs was given to the chief financial officer. The court rejected the IRS argument that the debtor was responsible because the debtor had the final authority over corporate financial affairs. The court held that the debtor was not a responsible person because although the debtor had the authority to control the corporation's finances, the debtor did not have the obligation to control the finances. The court held that even if the debtor would have been held to be a responsible person, the failure to pay the withholding taxes was not willful because the debtor had no knowledge of the failure. ***In re* Premo, 116 B.R. 515 (Bankr. E.D. Mich. 1990)**.

A shareholder who was an officer and director of a corporation was assessed and paid the 100 percent penalty as a responsible person for the failure of the corporation to pay federal employment taxes. The shareholder filed a claim against the debtor for subrogation of the penalty paid, arguing that the debtor was also a responsible person. The court held that payment of the penalty did not give rise to a right of subrogation against any other person against whom the IRS might assess the penalty as a responsible person. ***In re* Yeargin, 116 B.R. 621 (Bankr. M.D. Tenn. 1990)**.

RETIREMENT PLANS. The IRS has issued proposed regulations amending the regulations implementing I.R.C. §§ 401(a)(4), 410(b). The amendments revise the rules under the nondiscrimination requirements under Section 401(a). The amendments also change the rules governing the application of the average benefit percentage test under Section 410(b) to employee stock ownership plans. The proposed regulations interpret the Section 401(a)(4) requirement that contributions or benefits provided under a tax-qualified retirement plan not discriminate in favor of highly compensated employees. **55 Fed. Reg. 37888 (Sept. 14, 1990)**.

S CORPORATIONS

BUILT-IN GAINS. An S corporation transferred one of its businesses to a corporation wholly-owned by one of its shareholders in return for stock which was then issued to the corporation's shareholders. The IRS ruled that the momentary ownership of the other corporation's stock would not terminate the corporation's S status and because the business assets were transferred from a corporation not subject to the net built-in gains tax, the receiving corporation would not be liable for built-in gains tax. **Ltr. Rul. 9037017, June 15, 1990**.

TRUSTS. The taxpayers, husband and wife, established a trust for their four children. Only one of the taxpayers will contribute property to the trust and will be treated as the true grantor of the trust with the spouse as nominal grantor. The trustee may not make distributions to the beneficiaries in satisfaction of the taxpayers' support obligation. When one beneficiary reaches age 30, the trust is to be divided into shares for the then living children and any living children of a deceased child. When each beneficiary reaches age 30, the beneficiary may require distribution of up to 50 percent of the share of trust corpus. One trustee has the power, in a nonfiduciary capacity, to acquire property of the trust in exchange for property of equal value. IRS held that until one of the beneficiaries reaches age 30, the trust was an eligible Subchapter S trust because the taxpayer would be considered the owner of the trust and would be required to include all items of trust income and deductions in computing taxable income. **Ltr. Rul. 9037011, June 14, 1990**.

SAFE HARBOR INTEREST RATES

OCTOBER 1990

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	8.16	8.00	7.92	7.87
110%AFR	8.99	8.80	8.71	8.64
120%AFR	9.83	9.60	9.49	9.41
Mid-term				
AFR	8.82	8.63	8.54	8.48
110%AFR	9.72	9.49	9.38	9.31
120%AFR	10.63	10.36	10.23	10.14
Long-term				
AFR	9.12	8.92	8.82	8.76
110%AFR	10.15	9.81	9.69	9.62
120%AFR	10.99	10.70	10.56	10.47

SOCIAL SECURITY. The SSA has adopted as final amendments to the regulations implementing changes made by TAMRA 1988 in (1) reducing the rate for computing excess earnings for beneficiaries age 65-69 from 50 percent to 33 1/3 percent for taxable years after 1989, (2) providing that the number of months for computing excess earnings in the taxable year of death is always 12, and (3) providing that the annual exempt amount for beneficiaries age 65-69 applies to decedents who die in a taxable year in which they would have attained 65 but died prior to attaining that age. **55 Fed. Reg. 37469 (Sept. 12, 1990)**.

TRUSTS. The taxpayer's foreign and domestic trusts were held to be shams created solely for generating tax deductions and a "blatant" and intentional attempt to conceal income where the taxpayer retained complete ownership and control over the assets of the trusts. The taxpayer was assessed penalties for fraud. **Able Co. v. Comm'r, T.C. Memo. 1990-500**.

MORTGAGES

FORECLOSURE. The first mortgage holder foreclosed and sold the defendant farmer's farmland and the defendant failed to redeem the property within the 12 month redemption period. Within five days after the end of the redemption period, the second mortgage holder redeemed the land. From 1985 through 1989, the second mortgage holder sold or leased portions of the land without providing the defendant with an opportunity to first repurchase the land. The second mortgage holder argued that the defendant did not have a right to repurchase the farmland because the first mortgage holder was the immediate preceding owner of the farmland. The court held that because the period of redemption for all secured creditors had not expired before the second mortgage holder redeemed the land, the first mortgage holder never had complete ownership of the land; therefore, the only previous holder of complete title was the defendant. In addition, the court held that the first mortgage holder, a bank, could not be an immediate previous owner because the bank was not a farmer. **Farmers and Merchants Bank of Preston v. Junge, 458 N.W.2d 698 (Minn. Ct. App. 1990)**.

PARTNERSHIPS

DISSOLUTION. The parties in this case were equal partners in a partnership which operated a livestock purchasing and selling operation. The business was operated on land owned personally by the defendant. After the partnership dissolved, the defendant operated the business for six months until the partnership assets were sold for $80,000, including the sale of the land owned by the defendant. The plaintiff challenged the defendant's allocation of the purchase price of $18,000 for the partnership property and goodwill and $62,000 to the defendant's land. Based on values placed on the property by the partners in previous transactions, the court held that the land had a value of $19,000 and the remainder of the purchase price would be allocated to partnership property to be divided between the partners. **Hum v, Ulrich, 458 N.W.2d 615 (Iowa App. 1990)**.

RIPARIAN RIGHTS

DRAINAGE. The parties in this action were neighbors who had both constructed dams to change the flow of water over their lands which resulted in additional water flowing onto the other's land. The court held that the plaintiffs' construction of a berm to prevent surface water from flowing onto their property was allowable under the Missouri "common enemy doctrine" which allows a landowner to fend off surface water without being liable for the damages to other property. The defendants had failed to demonstrate that the diverted water came from a natural watercourse and was not surface water. The court also found that the defendant's would not be required to lower the level of a dam obstructing a creek because the plaintiffs failed to demonstrate that the excess water flowing over their property resulted from the dam and not from excessive rains. **Haith v. Atchinson County, 793 S.W.2d 151 (Mo. Ct. App. 1990)**.

SECURED TRANSACTIONS

SUBROGATION. The debtor in bankruptcy had purchased logging vehicles from a dealer who assigned the loans to a bank which filed and perfected security interests in the equipment. After the debtor defaulted on the loans, the equipment was returned to the dealer who paid the remaining balance of the loan to the bank. The bank then filed a termination of the security interests. The bankruptcy trustee claimed that the dealer was an unsecured creditor and that the transfer of the equipment was subject to the trustee's avoidance powers under Section 547. The dealer argued that a subrogation agreement between the dealer and the bank made the dealer a secured creditor. The court held that the subrogation agreement gave the dealer only the rights held by the bank and the dealer became unsecured when the bank filed the termination of the security interests. ***In re* IDK Logging, Inc., 116 B.R. 788 (Bankr. E.D. Wash. 1990)**.

STATE REGULATION OF AGRICULTURE

PETS. The plaintiff was a pet dog breeder who was licensed by the U.S. D.A. to sell dogs in interstate commerce. The plaintiff challenged the Kansas Animal Dealers Act, Kan. Stat. § 47-1701 *et seq.*, as violating the commerce clause, as preempted by the federal Animal Welfare Act, and as violating the equal protection clause for regulating greyhounds differently from other breeds. The

court granted summary judgment against the plaintiff on all counts. The court held that the Kansas law was similar to the federal law and furthered the valid state purposes of quality control and humane treatment in breeding animals. **Kerr v. Kimmell, 740 F.Supp. 1525 (D. Kan. 1990)**.

STATE TAXATION

PARTNERSHIPS. The taxpayers were partners in a horse farm partnership with their son. Under the partnership agreement, the son was to receive all partnership profits and the father would be allocated all losses. The court held that the father was entitled only to one-half of the losses in accordance with the father's one-half ownership interest in the partnership because the mother actually contributed one-half of the capital for the partnership either from her own account or from funds contributed from their joint accounts. **Wall v. Wisconsin Dept. of Revenue, 458 N.W.2d 814 (Wis. Ct. App. 1990)**.

WORKERS' COMPENSATION

FARM LABORER. The injured claimant worked in the defendant's onion shed where onions grown by the defendant were culled, sorted and sacked for shipment. The onion shed was not located on property which was used for producing the onions. The claimant's job was to fill, type and stack onion stacks. The claimant was injured while loading sacked onions. The court held that the claimant was not a farm laborer exempt from the workers' compensation laws because the claimant's job was not an essential part of the cultivation of the onions, not related to an essential part of the cultivation process, and was not performed on the land where the crops were grown. The court held that it was the nature of the claimant's work and not the nature of the employer's business which determined the status of the worker as a farm laborer. **Holgun v. Billy the Kid Produce, 795 P.2d 92 (N.M. Ct. App. 1990)**.

CITATION UPDATES

Cohen v. Comm'r, 910 F.2d 422 (7th Cir. 1990), *aff'g*, 92 T.C. 1039 (1989) (interest free loans), see p. 173 *supra*.

Est. of Howard v. Comm'r, 910 F.2d 633 (9th Cir. 1990), *rev'g*, 91 T.C. 329 (1989) (marital deduction), see p. 165 *supra*.

NEW AGRICULTURAL LAW JOURNAL

CALL FOR PAPERS. The San Joaquin College of Law has inaugurated a new law review, **The Agricultural Law Review**. The review is seeking manuscripts for publication in the first issue, scheduled to be published in the spring of 1991 with manuscripts due by November 15, 1990. Manuscripts should be sent to: Articles Editor, San Joaquin Agricultural Law Review, San Joaquin College of Law, 3385 E. Shields Ave., Fresno, California 93726. For more information, call (209) 225-0510.

BACK ISSUES

Back issues of the Agricultural Law Digest may be ordered for $5.00 each from Robert Achenbach, Editor, Agricultural Law Digest, P.O. Box 5444, Madison,Wisconsin 53705. Please refer to the issue number. The published issues with the title of the article by Dr. Neil Harl are listed below.

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No. 2 "Leasing Farm Property"
No. 3 "Income Tax Rules for Farm Vehicles"
No. 4 "Depreciation of Farm Property"
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