excludible is the excess of actual over normal living expenses.[27] The amount of insurance proceeds excludible from income cannot be determined until the end of the loss period, with any excess includible in income for the taxable year in which the loss period ends or, if later, the year the excess is received.[28]

SPECIAL NOTE: The IRS has announced that in flooded areas of the midwest returns due on or after June 30, 1993 may be filed without penalty by October 15, 1993. Interest, however, will be due for the period of the delay. Taxpayers should write in red "FLOOD DISASTER, COUNTY OF _____" on the top of their returns. **IR 93-62, July 27, 1993**.

Also, the Revenue Reconciliation Act of 1993 includesrelief provisions involving losses relating to flooding. See p. 126-127 *supra*.

FOOTNOTES

1 E.g., I.R.C. § 1033(e) (sale and reinvestment of livestock held for draft, dairy or breeding purposes).
2 E.g., I.R.C. § 451(d) (one-year deferral for crop insurance proceeds and federal disaster assistance payments).
3 Treas. Reg. § 1.61-4(c).
4 I.R.C. § 451(d). See generally 4 Harl, *Agricultural Law* § 27.03[7][a] (1993); Harl, *Agricultural Law Manual* § 4.02[4] (1993).
5 I.R.C. § 451(d). See Rev. Rul. 91-55, 1991-2 C.B. 784.
6 Notice 89-55, 1989-1 C.B. 696.
7 Treas. Reg. § 1.451-6.
8 I.R.C. § 451(d).
9 Treas. Reg. § 1.451-6(a)(1).
10 *Id*.
11 Rev. Rul. 74-145, 1974-1 C.B. 113. See Notice 89-55, 1989-1 C.B. 696.
12 Treas. Reg. § 1.451-6(b).
13 I.R.C. § 451(e).
14 H.R. 2735, 102d Cong., 2d Sess. (1992).
15 I.R.C. § 1033(e).
16 See Rev. Rul. 79-263, 1979-2 C.B. 82; Notice 89-55, 1989-1 C.B. 696.
17 I.R.C. § 165. See Treas. Reg. § 1.165-7(a)(1).
18 Maduz v. Comm'r, T.C. Memo. 1961-249.
19 Radding v. Comm'r, T.. Memo. 1988-250 (deduction limited to repair costs in excess of insurance recovery).
20 Helstoski v. Comm'r, T.C. Memo. 1990-382.
21 *Id*. See Beyer v. Comm'r, T.C. Memo. 1993-313 (deduction allowed for repairs because of storm damage; deduction not allowed for diminution in value of beach front property).
22 I.R.C. § 165(a), (b).
23 Treas. Reg. § 1.165-7(a)(2).
24 See I.R.C. § 165(a).
25 Treas. Reg. § 1.165-11(a), (b).
26 I.R.C. § 123(A).
27 I.R.C. § 123(b).
28 Rev. Rul. 93-43, I.R.B. 1993-24, 54.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ANIMALS

FENCES-*ALM* § 1.01[2].* The plaintiff was injured when the plaintiff's truck struck a horse owned by the defendant on an interstate highway. The highway was in a "horse herd district" and the state highway department had constructed a fence between the highway right-of-way and the defendant's land. The state was named as a defendant for negligently failing to maintain the fence. The court held that the state had no duty to maintain the fence under statute or regulations and therefore could not be held liable for negligent maintenance of the fence. **Yager v. Deane, 853 P.2d 1214 (Mont. 1993)**.

BANKRUPTCY

GENERAL

EXEMPTIONS

AVOIDABLE LIENS. The debtors had claimed a rural homestead as exempt in a Chapter 7 case. Prior to the bankruptcy filing, a creditor obtained a judgment lien against the debtors' property. The debtors were denied a discharge under Section 727 and filed for avoidance of the judgment lien as impairing their homestead exemption. The court held that the denial of discharge did not affect the avoidance rights of the debtors for liens which impaired exemptions. The court also held that the judgment lien was not avoidable for impairing the homestead exemption because, under Texas law, judgment liens do not attach to property previously declared to be the debtor's homestead; therefore, the lien could not impair the homestead exemption. ***In re* Henderson, 155 B.R. 157 (Bankr. W.D. Tex. 1992)**.

The debtors owned two properties, a residence and a gas station. The properties were subject to the same wrap-around mortgage and had a fair market value of $11,000 more than the remaining amount on the mortgage. The debtors claimed the entire equity amount as exempt. The properties were also subject to a judicial lien for $10,000. The court held that because the properties were both subject to the same indebtedness, the two properties would be combined for purposes of determining whether the debtors had any equity in the properties. The court held that the judicial lien would be avoided as impairing the debtors' equity in the properties. An unexplained issue in the case is what exemption was claimed as to the gas station property. The debtors had claimed only a homestead exemption under Section 522(d)(1) and the court did not discuss the availability of that exemption for the gas station. A better result would have been reached had the total equity been allocated to the separate properties, based on relative fair market values, and the judicial lien avoided to the extent it impaired the allowable homestead exemption on the residence. ***In re* Frameli, 155 B.R. 354 (Bankr. W.D. Pa. 1993)**.

The debtor owned property with the nondebtor spouse as tenants by the entirety and claimed an exemption in the property to the extent of the debtor's right to use and control the property, the exemption allowed under Tennessee law.

The debtor sought to avoid a judgment lien against the properties, arguing that the lien impaired the right to use and control the property because the property could be sold only with the approval of the lienholder since the lien was effective as to the debtor's survivorship interest in the property. The court held that the lien could not be avoided because the lien did not impair the debtor's right to use and control the property. The ruling implies that the right to sell property owned as tenants by the entirety is either not a right eligible for the exemption or at least is not a part of the right to use and control the property. ***In re* Arango, 155 B.R. 465 (E.D. Tenn. 1993), *aff'g*, 136 B.R. 740 (Bankr. E.D. Tenn. 1992)**.

CHAPTER 12

AUTOMATIC STAY-*ALM* § 13.03[2].• The debtor had originally filed a Chapter 11 case and a plan was confirmed. The debtor defaulted on the plan and a secured creditor began foreclosure of the debtor's farm. The debtor filed a Chapter 12 case to stop the foreclosure. The creditor objected to the Chapter 12 filing as not in good faith and because the debtor was not eligible for Chapter 12 since the debtor had more than $1.5 million in debts. The creditor obtained relief from the automatic stay to foreclose against the farm and the court ruled that the debtor was not eligible for Chapter 12. The debtor filed appeals of those rulings. Within 30 minutes before the foreclosure sale was to commence, the debtor filed a Chapter 11 petition, but the creditor proceeded with the sale. The debtor subsequently dismissed the appeals of the earlier rulings and sought to avoid the foreclosure sale as violating the automatic stay of the Chapter 11 filing. The court held that the automatic stay was not violated because the Chapter 11 filing was improper. Since the appeal of the Chapter 12 rulings extended the existence of the Chapter 12 case, the Chapter 11 case was filed during an existing Chapter 12 case; therefore, the Chapter 11 case was improper and void. In addition, the court held that the Chapter 11 petition could not be used to prevent the sale because the petition was not filed in good faith since the only purpose of the filing was to delay the foreclosure sale. The court did not award sanctions against the debtor, reasoning that the debtor's actions were motivated only by desperation to retain the farm. Sanctions were also not imposed on the debtor's counsel because the court felt that the counsel was only trying to help the debtor. ***In re* Cross Timbers Ranch, Inc., 155 B.R. 215 (Bankr. W.D. Mo. 1993)**.

FEDERAL TAXATION

AUTOMATIC STAY-*ALM* § 13.03[2].• After the debtors had filed for bankruptcy, the IRS filed a tax lien against the debtors' homestead to secure a prepetition tax claim. The lien was filed without knowledge of the bankruptcy filing. However, after the IRS was notified of the bankruptcy filing, the IRS negotiated the release of the lien by requiring the debtors to deliver two refund checks back to the IRS and to pay the remaining amount of the tax claim from the proceeds of the sale of the homestead. The debtors had claimed a homestead exemption. The court held that although the initial filing of the tax lien was not a willful violation of the automatic stay, the failure of the IRS to release the lien without conditions after learning about the bankruptcy filing was a willful violation of the stay. The court ordered the IRS to release the lien and to satisfy the remaining amount, over $7,000, of the tax claim in payment of damages suffered by debtors. ***In re* Rhodes, 155 B.R. 491 (W.D. Ark. 1993), *aff'd*, 147 B.R. 492 (Bankr. W.D. Ark. 1992)**.

DEDUCTIONS-*ALM* § 13.03[7].• The Chapter 7 trustee filed corporate income tax returns for the debtor corporation which reported income and expenses on the accrual method of accounting. The trustee filed amended returns deducting expenses for accrued post-petition interest on general unsecured claims filed in the case. The corporation was insolvent throughout the bankruptcy case. The IRS denied the deductions. Under I.R.C. § 461, an interest deduction would not be deductible under the accrual method of accounting until the taxpayer became liable "in all events" for the expense. The court held that the estate would not be liable "in all events" for the post-petition interest until the estate had paid all unsecured claims and had property remaining to pay the interest. During the taxable years of the bankruptcy case, the debtor was insolvent so that no property would remain after payment of all unsecured creditors; therefore, the interest claims did not accrue during the bankruptcy case. ***In re* West Texas Marketing Corp., 155 B.R. 399 (Bankr. N.D. Tex. 1993)**.

DISCHARGE. In April 1990 the IRS assessed the debtor for 1982 through 1986 taxes. The debtor filed a Chapter 13 case in July 1990 which was voluntarily dismissed in February 1991. The debtor refiled for Chapter 13 in April 1991 and sought discharge of the 1982 through 1986 taxes as assessed before 240 days before the filing for bankruptcy. The court held that the 240 day limitation period was tolled during the first bankruptcy case and the taxes were not dischargeable. ***In re* Richards, 994 F.2d 763 (10th Cir. 1993), *aff'g*, 141 B.R. 751 (W.D. Okla. 1992)**.

POST-PETITION INTEREST. The debtor had filed a Chapter 13 case which was dismissed after the debtor failed to make plan payments. The IRS had filed three claims in that case, a secured claim, a priority claim and an unsecured claim. The debtor filed a second Chapter 13 case and the IRS filed three claims of the same type but included interest and penalties accrued during the first Chapter 13 case. The court held that the interest and penalties were allowable but needed to be reduced to reflect the debtor's plan payments on the secured claim. ***In re* Kirnie, 93-2 U.S. Tax Cas. (CCH) ¶ 50,434 (Bankr. E.D. Pa. 1993)**.

RESPONSIBLE PERSON. The debtor as an officer and director of a cattle breeding corporation, was a signatory on the corporation's checking accounts, and had the authority to borrow money for the corporation and to hire employees. The debtor's duties, however, involved primarily the management of the cattle breeding operation and the debtor's brother, the sole shareholder, managed the administration of the company, including payment of wages and taxes. The Bankruptcy Court initially held that the debtor was not a "responsible person" liable for the 100 percent penalty, under I.R.C. § 6672, for the failure of the corporation to pay withheld employment taxes. That decision was reversed by the District Court in an unpublished opinion. On remand the Bankruptcy Court held that the IRS could assess the penalty in a lump sum and was not required to assess the penalty on a quarterly basis. ***In re***

Taylor, 155 B.R. 543 (W.D. Okla. 1993), ***on rem. from unrep. D. Ct. dec. rev'g and rem'g*****, 140 B.R. 294 (Bankr. W.D. Okla. 1992)**.

RETURNS-*ALM* § 13.03[7].• The Chapter 7 trustee filed the debtor's corporate income tax return for 1989 and requested a prompt determination from the IRS under Section 505(b). The IRS did not respond to the request within 60 days but 84 days later assessed the estate for a penalty for failure to pay estimated tax for 1989. The court held that although the trustee and debtor would not be liable for the penalty, the penalty would be allowed as a claim against the estate. The court held that the estate was not a "successor to the debtor;" therefore, the estate was not relieved of liability by Section 505. ***In re*** **West Texas Marketing Corp., 155 B.R. 399 (Bankr. N.D. Tex. 1993)**.

CONTRACTS

BREACH. The plaintiff contracted with the defendant to purchase male and female pairs of ostrich chicks. The contract provided for the purchase of up to 10 pairs in 1988 at $1,500 per pair and up to 10 pairs in 1989 at the "going market price." The plaintiff attempted to purchase chicks in 1988 but the defendant was unable to sell any. After oral negotiations, the plaintiff sent a letter reviewing the parties' modification of the contract to have the 1988 chicks delivered from the 1989 hatch. The letter was silent as to the price but the plaintiff argued, and the trial court agreed, that the term "1988 chicks" indicated that the 1988 price was to apply. In 1989, the market price for ostrich chicks was $6,000 per pair and the defendant refused to sell the plaintiff any chicks at the contract price for 1988 chicks. The court held that the letter was a modification of the contract and that a breach of the contract did not occur until the defendant refused to sell the chicks in 1989; therefore, the damages were to be calculated based on the difference between the 1989 market price and the 1988 contract price. **Dixon v. Roberts, 853 P.2d 235 (Okla. Ct. App. 1993)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS-*ALM* § 11.01[2][g].• The debtor lost a farm on a foreclosure sale to the FmHA. While the farm was in the FmHA inventory, the FmHA declared a wetlands easement on more than half of the farm. The FmHA sold the farm to the debtor at a price reduced to reflect the loss of value from the wetlands easement. After the debtor was unable to produce sufficient income from the farm to meet the purchase payments, the debtor sought removal of the wetlands easement as an unlawful cloud on the title. The court held that the wetlands easement was allowed under Executive Order 11990 which was not prohibited by the subsequent Agricultural Credit Act of 1987 or the Food Security Act of 1985 which established the lease/buyback program. The court also held that an issue of fact remained as to whether the wetlands were in fact wetlands when the FmHA acquired the property or were changed to become wetlands while in the FmHA possession. **Harris v. U.S., 820 F. Supp. 1018 (N.D. Miss. 1992)**.

In a later hearing on the wetlands issue, the court upheld the FmHA determination that the property was wetlands based on a Fish and Wildlife Service survey of the property. **Harris v. U.S., 820 F. Supp. 1026 (N.D. Miss. 1993)**.

FEED GRAINS. The CCC has issued proposed regulations establishing the acreage reduction for corn, grain sorghum and barley at no more than 12.5 percent and for oats at zero percent for 1994 crops. **58 Fed. Reg. 41643 (Aug. 5, 1993)**.

MEAT AND POULTRY PRODUCTS. The FSIS has issued interim regulations requiring safe handling instructions on all raw meat and poultry product labeling, including instructions on storage, cross-contamination, cooking, and handling of leftovers. **58 Fed. Reg. 43478 (Aug. 16, 1993)**.

PEANUTS. The CCC has issued interim regulations increasing to $2.00 per ton of peanuts the maximum deduction from producer price support advances which may be made by the Southwest area marketing association for related activities of the association outside of the price support program. **58 Fed. Reg. 41625 (Aug. 5, 1993)**.

POULTRY. The APHIS has issued proposed regulations making the following changes in the salmonella enteritidis (SE) regulations: (1) exempting flocks from the testing requirements if the flocks are participating in voluntary testing; (2) removing testing blood and internal organs from test flocks; (3) adding egg tests for study flocks; (4) addition of requirements for trapping rodents; and (5) allowing SE-positive houses and flocks to be released from regulation only through depopulation, cleaning and disinfection, but not through negative testing. **58 Fed. Reg. 41048 (Aug. 2, 1993)**.

SEASONAL AGRICULTURAL WORKERS-*ALM* § 3.04.• The Eleventh Circuit Court of Appeals has revised the text, but not the result, of *Caro-Galvan v. Curtis Richardson, Inc., 981 F.2d 501 (11th Cir. 1993)*, see p. 50 *supra*. **Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d 1500 (11th Cir. 1993)**.

The plaintiffs were seasonal migrant farm workers who harvested pickles on the defendant's farm. The defendant had the workers sign contracts as independent contractors to harvest the pickles, although the workers were paid wages when they worked at sorting, grading and packing the pickles. The plaintiffs had no control over where to pick the crop nor owned any equipment except for a few buckets. The defendant had the right to fire the workers without liability and controlled all aspects of planning, planting, growing and harvesting the crop. The court held that the workers were employees entitled to protections under the Fair Labor Standards Act and the Agricultural Worker Protection Act (now the Migrant and Seasonal Agricultural Workers Protection Act). **Cavazos v. Foster, 822 F. Supp. 438 (W.D. Mich. 1993)**.

FEDERAL ESTATE AND GIFT TAX

CHARITABLE DEDUCTION-*ALM* § 5.04[4].• The taxpayer established a 20-year irrevocable charitable lead trust with unencumbered property. The taxpayer's son and an independent trust company served as co-trustees. The trust provided for annual payments of 6 percent of the net fair market value of the trust assets to charitable organizations as selected by the co-trustees each year, except that a beneficiary may not be an organization in which the grantor served in a fiduciary capacity. The remainder passed to the grantor's descendants. The IRS ruled that the trust was eligible for the charitable deduction because (1) the power of the co-trustees to select the charitable beneficiaries each year did not effect the eligibility of the trust for the charitable deduction; (2) the son's serving as trustee did not effect the eligibility of the trust for the charitable deduction; (3) the grantor would not be treated as the owner of the trust. The IRS also ruled that the trust would not be included in the grantor's gross estate because the grantor retained no power over the trust. **Ltr. Rul. 9331015, May 11, 1993**.

GENERATION SKIPPING TRANSFERS-*ALM* § 5.04[6].• Seven trusts for seven great-grandchildren were created in 1957. The trusts had after-born great-grandchildren clauses which resulted in seven subtrusts for each of two great-grandchildren, born in 1958 and 1960. Another 14 trusts were established for grandchildren and their children, again with an after-born great-grandchildren clause. When the 1960 great-grandchild was born, 14 subtrusts were created for that child. The trust consolidated the subtrusts for each child into three trusts. The IRS ruled that the consolidation would not subject the trusts to GSTT. **Ltr. Rul. 9330031, May 4, 1993**.

At the decedent's death, the residuary estate passed to two trusts for the surviving spouse, a marital trust and a non-marital trust. The marital trust was QTIP and contained enough property to decrease the decedent's estate tax to zero. The executors split the marital trust into two more trusts, one remaining as a QTIP trust and the other becoming a "reverse QTIP" trust. The IRS ruled that the split was allowable. **Ltr. Rul. 9331004, April 23, 1993**.

GROSS ESTATE-*ALM* § 5.02.• The decedent's estate included two limited partnership interests. The plaintiffs had become responsible for the decedent's affairs in 1979 and in 1983 entered into negotiations to sell the partnership interests to the general partner. In the course of the negotiations, the plaintiffs learned that the general partner had been misappropriating partnership assets and filed suit. After the decedent died, the suit was settled for over $3 million. The partnership assets attributable to the partnership interests were valued at just over $1.2 million. The court held that the decedent's estate included the partnership interests and the value of the claim against the general partner even though some of the facts giving rise to the claim did not become known until after the decedent's death. The court held that the value of the partnership interests was the value of the partnership property attributable to the interests and the value of the settlement was the amount received in the settlement above that amount. **Rubenstein v. U.S., 93-2 U.S. Tax Cas. (CCH) ¶ 60,143 (S.D. Fla. 1993)**.

POWERS OF APPOINTMENT-*ALM* § 5.02[5].• The trust was established by the decedent's parents in 1966 and became irrevocable upon the death of the decedent's father in 1974. Upon the death of the decedent's mother in 1975, the decedent received the net income of the trust and had a testamentary power of appointment over the trust corpus, except for two $15,000 specific bequests, to anyone except the decedent, the decedent's estate or the decedent's creditors. The decedent's will exercised the power of appointment to a trust for the decedent's child and grandchildren. The IRS ruled that the trust corpus was not included in the decedent's gross estate because the decedent did not have a general power of appointment over the property nor did the decedent create a general power of appointment. The IRS also ruled that the trust was not subject to GSTT because the decedent's exercise of the power of appointment to continue the trust did not extend the trust more than 21 years after a life in being on the date of the creation of the trust, the date the trust first became irrevocable in 1974. **Ltr. Rul. 9330008, April 22, 1993**.

The taxpayer was a lifetime income beneficiary of a trust established by the taxpayer's deceased parent. The trust provided the taxpayer with the right to receive one-fourth of the trust corpus at age 35 and age 40 and with a testamentary general power of appointment over trust corpus. The taxpayer released the right to distributions of trust corpus and partially released the power of appointment to limit the power to appoint only to the taxpayer's spouse and descendants. The taxpayer's will appoints the trust property to the taxpayer's descendants in trust for 21 years after the death of the taxpayer. The IRS ruled that the trust corpus was not includible in the taxpayer's gross estate, and because the trust was irrevocable before 1985, the exercise of the power of appointment would not subject the trust to GSTT. **Ltr. Rul. 9330035, May 5, 1993**.

FEDERAL INCOME TAXATION

CASUALTY LOSSES-*ALM* § 4.05[2][a].• The taxpayer claimed a loss deduction for the taxable year in which payment was received on a claim for damages to the taxpayer's automobile. The court held that because the settlement was finalized in the previous taxable year, the loss was finalized and became deductible in that year. **Bigoni v. Comm'r, T.C. Memo. 1993-257**.

HOBBY LOSSES-*ALM* § 4.05[1].• The taxpayer was allowed business loss deductions from a horse breeding and racing activity where the taxpayer operated the business in a businesslike manner by consulting experts and adjusting business activities to meet changing circumstances. **Arwood v. Comm'r, T.C. Memo. 1993-352**.

INFORMATION RETURNS. The taxpayer was a trucking company which operated a fleet of trucks and arranged for other companies or individuals to haul agricultural commodities, primarily for a single client. The taxpayer added a mark up to the charges submitted by the other companies and individuals when the taxpayer submitted the charges to the client. The IRS ruled that the exception under Treas. Reg. § 1.6041-1(a) for freight charges was applicable to relieve the taxpayer of the requirement to report payments of $600 or more to the companies and individuals who hauled the commodities for the client at the arrangement of the taxpayer. **Ltr. Rul. 93290001, March 5, 1993**.

INVESTMENT TAX CREDIT-*ALM* § 4.04[1].• The taxpayer was denied investment tax credit for expenses in rehabilitating a building because the taxpayer used the building as a personal residence and did not use the structure in a trade or business. The taxpayer also had failed to obtain certification of the building as a historical structure or demonstrate that an application had been made for certification. **Dennis v. Comm'r, T.C. Memo. 1993-345**.

PARTNERSHIPS-*ALM* § 7.03.*

DEFINITION. In 1954, the taxpayer's business was incorporated. In 1982, the corporation's state charter was terminated for failure to pay state franchise taxes. The taxpayers continued to operate the business as a corporation, the corporation did not terminate after the death of two major shareholders and the business continued to identify itself to the public as a corporation. The corporation filed untimely corporate income tax forms for 1983 through 1989 then filed amended returns in an attempt to be taxed as a partnership. The taxpayer argued that the loss of the charter terminated the corporation. The court held that the business had limited liability, free transferability of interests, continuity of life and centralized management; therefore, for federal income tax purposes, the business was a corporation. **Eleanore Builders, Inc. v. U.S., 93-2 U.S. Tax Cas. (CCH) ¶ 50,426 (N.D. Ohio 1993)**.

LIMITED LIABILITY COMPANIES. The taxpayers formed a limited liability company (LLC). The IRS ruled that the LLC would be taxed as a partnership because (1) the LLC lacked the corporate characteristic of continuity of life since the state LLC law and the LLC agreement required the consent of all members to continue the partnership after a terminating event, and (2) the LLC lacked the corporate characteristic of transferability of interests because the Act and agreement provided that if any other member objected to the sale or assignment of a member's interest in the LLC, the transferee or assignee had no right to participate in the management of the LLC. The IRS also ruled that, assuming the LLC was not an investment company under I.R.C. § 351, (1) no gain was recognized from the formation of the LLC, and (2) the basis of an interest in the LLC was the amount of money and the adjusted basis, in the hands of the member just before contribution, of property contributed to the LLC by a member. **Ltr. Rul. 9331010, May 5, 1993**.

PENALTIES. The IRS has extended to taxpayers filing on 1992 returns for short taxable years beginning in 1993 the application of Rev. Rul. 92-23, 1992-1 C.B. 737 which identified the circumstances under which the disclosure on a taxpayer's return of a position with respect to an item is adequate for the purpose of reducing the understatement of income tax and return preparer penalties. **Rev. Proc. 93-33, I.R.B. 1993-28**.

PENSION PLANS. For plans beginning in July 1993, the weighted average is 7.79 percent with the permissible range of 7.01 to 8.57 percent for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 93-39, I.R.B. 1993-26, 10**.

RESPONSIBLE PERSON. The debtor was the president of a corporation which failed to pay several quarters of federal employment withholding taxes. The plaintiff discovered that the taxes were not paid after an investigation into the accounts handled by the plaintiff's brother, the secretary-treasurer of the corporation. The plaintiff consulted with an accountant and the IRS which agreed not to pursue the I.R.C. § 6672 responsible person penalty against the plaintiff and the plaintiff agreed to make installment payments on the taxes owed. The IRS agreement was sanctioned by a supervisor. The IRS continued to not pursue the plaintiff and accepted installment payments until the plaintiff and the corporation filed for bankruptcy. The court held that the plaintiff was a responsible person who had willfully failed to pay federal employment withholding taxes but that the IRS was estopped from assessing the penalty because of the plaintiff's reliance on the IRS's agreement not to pursue the plaintiff as a responsible person. ***In re* Mando, 154 B.R. 953 (Bankr. E.D. Ky. 1993)**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

ONE CLASS OF STOCK. The shareholders of an S corporation established a fund organized as a limited liability company. The fund was funded with a portion of each shareholder's dividends. The fund served as a savings and investment vehicle for each shareholder and as a fund to indemnify surety companies providing construction bond services for the S corporation. The IRS ruled that the fund did not create a second class of stock because the fund did not alter the shareholders' right to distribution and liquidation proceeds. **Ltr. Rul. 9330009, April 29, 1993**.

An S corporation entered into a split-dollar life insurance agreement with its shareholders. Under the agreement, the corporation paid the premiums on life insurance policies purchased and owned by the shareholders, and the shareholders agreed to reimburse the corporation to the extent the payment of the premiums conferred an economic benefit on the shareholders. The IRS ruled that the agreement did not create a second class of stock because the agreement did not alter the shareholders' right to distribution and liquidation proceeds. **Ltr. Rul. 9331009, May 5, 1993**.

SAFE HARBOR INTEREST RATES
September 1993

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	3.91	3.87	3.85	3.84
110% AFR	4.31	4.26	4.24	4.22
120% AFR	4.69	4.64	4.61	4.60
		Mid-term		
AFR	5.35	5.28	5.25	5.22
110% AFR	5.89	5.81	5.77	5.74
120% AFR	6.44	6.34	6.29	6.26
		Long-term		
AFR	6.28	6.18	6.13	6.10
110% AFR	6.92	6.80	6.74	6.71
120% AFR	7.56	7.42	7.35	7.31

TRAVEL EXPENSES. The taxpayer was a member of a partnership accounting business. The taxpayer was required by the partnership agreement to pay, without reimbursement, local automobile expenses incurred in the partnership business. The taxpayer also claimed that the partnership required the taxpayer's membership in various clubs to foster new business and to meet with clients. The partnership reimbursed the taxpayer for the dues involved but claimed the reimbursements as a guaranteed payment under I.R.C. § 707(c). The IRS ruled that the expenses were deductible from gross income by the taxpayer. **Ltr. Rul. 9330001, April 13, 1993; Ltr. Rul. 9330004, April 14, 1993**.

STRADDLES. The taxpayer was a company which made a large number of mixed straddles. Early in 1992, the company hired a new management team, including a tax director. Because of a large number of other pressing tax issues, the director did not seek to make an election to use a

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mixed straddle account under Treas. Reg. § 1.1092(b)-4T(f)(1) until six months after the due date. The IRS ruled that reasonable cause existed for the taxpayer's failure to timely make the election and allowed an extension to file the election. **Ltr. Rul. 9331011, May 5, 1993**.

UNRELATED BUSINESS INCOME. The plaintiff was an exempt nonprofit organization which owned six farms leased on a 50 percent crop share basis. The plaintiff was responsible for payment of property taxes and 50 percent of fertilizer, herbicide, pesticide and seed costs. The tenants were responsible for the other costs, including the harvesting costs. The parties agreed that the crop share rent was unrelated business income and that I.R.C. § 512(b)(3)(B)(i) would exclude rent from real property from the tax on unrelated business income. The IRS argued that the exception, under I.R.C. § 512(b)(3)(B)(ii), to the exclusion caused the income to be taxable as net income from a business because the plaintiff's net income from the farms depended on the amount of expenses which changed from year to year. The court held that under a crop share lease, the rental income was a fixed percentage of the gross receipts of the harvest and excludible from income under the parenthetical exception in I.R.C. § 512(b)(3)(B)(ii). In reaching its holding, the court noted that the net income of the plaintiff from the farms differed from the net income of the tenants in that each party had a different set of expenses; therefore, the plaintiff's rental income was not dependent upon the net income of each farm as a business unit, but was dependent upon the plaintiff's individual expenses. **Independent Order of Odd Fellows Grand Lodge of Iowa v. U.S., 93-2 U.S. Tax Cas. (CCH) ¶ 50,448 (S.D. Iowa 1993)**.

RIPARIAN RIGHTS

REASONABLE USE. The state had initiated an adjudication of water rights for the Marshall Lake basin from which the defendants withdrew water for irrigation. The defendant submitted a claim for water use based on a history of water use dating back to 1906. However, the defendant failed to provide sufficient evidence of the amount of water used to irrigate 73 acres of alfalfa. The court upheld the referee allowance of 1.5 c.f.s. of instantaneous flow based upon a Washington State University Research Bulletin irrigation report which identified the amount of water needed to irrigate an acre of alfalfa on land in the area of the defendants. The court denied the defendant's request for additional water use because the irrigation system required 3 cubic feet of water running through the system to produce 1 cubic feet of usable irrigation water. The court held that the irrigation system was too wasteful and that water rights could not be based on wasted water used. **State Dept. of Ecology v. Grimes, 852 P.2d 1044 (Wash. 1993)**.

SECURED TRANSACTIONS

CONVERSION. Two landlords of the same tenant filed an action for conversion and eloignment [removal for a distance] against the purchaser of hay from the tenant, claiming perfected landlords' liens on the hay. The purchaser argued that the action was barred by Wash. Rev. Code § 60.11.130 because the action was not brought within 24 months after the date of default by the tenant. The court held that the statute applied to foreclosure actions and not to conversion and eloignment actions. However, the court also held that the foreclosure limitation was relevant in that if the foreclosure action was timely brought, the liens would not expire. The court found that the foreclosure action had been timely brought. The purchaser also argued that the landlords had waived the security interest in allowing hay to be sold after the tenant's default. The court noted that some evidence was presented that the landlord had received advice from counsel to not contact potential hay buyers about the lien; therefore, an issue of fact remained as to whether the landlord's conduct waived the security interest. The court also held that the purchaser was not liable for conversion for hay purchased before the landlord's lien was filed. **Michel v. Melgren, 853 P.2d 940 (Wash. Ct. App. 1993)**.

A creditor had supplied fertilizer and other chemicals to the defendant for use in raising grass seed. The creditor filed a notice of lien with the Secretary of State and sent written notices of the lien to the defendant and several possible seed buyers, but not the company to whom the defendant sold the seed crop. The creditor sought to recover the proceeds of the crop from the buyer based upon its perfected lien. The filing statute, Or. Rev. Stat. § 87.332, only required written notice to the debtor and other known lien holders; therefore, the court held that the buyer was not entitled to a written notice and was liable for the conversion of the seed crop. **Green Valley Industries, Inc. v. Keech, 858 P.2d 318 (Or. Ct. App. 1993)**.

FRAUD. The defendants had borrowed operating funds from the plaintiff to the limit of the plaintiff's lending capability. In order to increase the defendant's loans, the plaintiff sought an FmHA guarantee of the original loan. When the guarantee was obtained, the plaintiff did not take the original loan off its books until a second loan was made to the defendant and the original loan was marked "renewed." The defendant sought discharge of the guaranteed loan, under N.D. Cent. Code § 41-03-44(2), alleging that the plaintiff fraudulently altered the loan instrument. The court held that sufficient evidence was presented to support the holding that no fraudulent alteration of the guaranteed loan occurred. **Sargent County Bank v. Wentworth, 500 N.W.2d 862 (N.D. 1993)**. .

REPOSSESSION. Just prior to the debtor's filing for bankruptcy, the secured creditor obtained a state court order for replevin of farm equipment serving as collateral for a defaulted loan. The creditor also obtained relief from the automatic stay to sell the collateral. The creditor failed to give the debtor written notice of the sale as required by Mo. Rev. Stat. § 400.9-504(3) and the debtor sought disallowance of the creditor's claim for the deficiency on the loan after application of the collateral proceeds. The debtor somehow received notice of the sale and was present. The court held that the written notice requirement is strictly enforced in Missouri courts, even when the debtor has other actual notice of the sale, and held that the creditor's claim for the deficiency was disallowed. ***In re* Hull, 155 B.R. 515 (Bankr. W.D. Mo. 1993)**.

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ZONING

EXCEPTION. The plaintiff sought an exception to the zoning of their dairy farm as agricultural-residential in order to develop the land for single family residences. The court upheld the Zoning Hearing Board's ruling that an exception was not warranted because (1) the land had been used and was suitable for dairy farming, (2) there were no localized wet or rocky conditions adverse to agricultural use, (3) the adjacent land uses were not inconsistent with agricultural use of the land, (4) the plaintiff failed to provide tests or other evidence that the sites were suitable for on-site sewage disposal. **Henley v. Zoning Hearing Bd., 625 A.2d 132 (Pa. Cmwlth. 1993)**.

CITATION UPDATES

Hall v. U.S., 822 F. Supp. 463 (M.D. Tenn. 1992) (marital deduction) see p. 97 *supra*.

CF Industries, Inc. v. Comm'r, 995 F.2d 101 (7th Cir. 1993), ***aff'g and modifying*****, T.C. Memo. 1991-568** (cooperatives) see p. 98 *supra.*

Est. of Whittle v. Comm'r, 994 F.2d 379 (7th Cir. 1993), ***aff'g*****, 97 T.C. 362 (1991)** (credit for prior transfers) see p. 112 *supra*.

McLennan v. U.S., 994 F.2d 839 (Fed. Cir. 1993), ***aff'g*****, 23 Cls. Ct. 99 (1991) and 24 Cls. Ct. 102 (1991)** (charitable deduction) see p. 106 *supra*.

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