



**Agricultural Law Press**

Publisher/Editor

Robert P. Achenbach, Jr.

Contributing Editor

Dr. Neil E. Harl, Esq.

\* \* \* \*

**Issue Contents**

**Bankruptcy**

General

Exemption

Homestead **107**

Chapter 12

Eligibility **107**

Plan **107**

Secured claims **107**

Federal tax

Discharge **107**

**Contracts**

Hedge-to-arrive contracts **107**

**Employer Liability**

Independent contractor **108**

**Federal Agricultural Programs**

Beef check-off **108**

Karnal bunt **108**

**Federal Estate and Gift Tax**

Alternate valuation date **108**

Annuity **108**

Charitable deduction **108**

Gifts **109**

**Federal Income Taxation**

Accounting method **109**

“At risk” loss limitation **109**

Bad debt deduction **109**

Charitable deduction **109**

Clergy **109**

Cooperatives **109**

Depreciation **110**

Partition **110**

Partnerships

Administrative adjustments **110**

Pension plans **110**

S corporations

Bankruptcy **110**

Trusts **111**

Safe harbor interest rates

August 2003 **111**

Specified liability loss **111**

**Negligence**

Irrigation ditch **111**

**Patents**

Saved seed **111**

# Agricultural Law Digest

Volume 14, No 14

July 25, 2003

ISSN 1051-2780

## Excluding Gain on Sale of Residence

— by Neil E. Harl\*

The final regulations<sup>1</sup> (which were published on December 24, 2002) to determine a taxpayer’s principal residence when the taxpayer maintained multiple residences have been litigated in a 2003 federal district court case.<sup>2</sup> The final regulations were applied even though the transaction in question arose in the 1998 tax year and the regulations did not become final until December 24, 2002.<sup>3</sup>

### The regulations

The final regulations identified several relevant factors in determining whether a transaction involved the sale of the taxpayer’s *principal* residence when the taxpayer was occupying more than one residence.<sup>4</sup> The regulations articulate a facts and circumstances test in determining a taxpayer’s residence with several relevant factors identified—(1) the taxpayer’s place of employment; (2) the principal place of abode of the taxpayer’s family members; (3) the address listed on federal and state tax returns, driver’s license, automobile registration and voter registration card; (4) the taxpayer’s mailing address for bills and correspondence; (5) the location of the taxpayer’s banks; and (6) the location of religious organizations and recreational clubs with which the taxpayer is affiliated.<sup>5</sup> The regulations go on to state that the property the taxpayer uses a majority of the time during the year as a residence ordinarily is considered to be the taxpayer’s principal residence.<sup>6</sup> The regulations contemplate that taxpayers can have only one principal residence at a time. The additional specificity in the final regulations is obviously directed at those situations where taxpayers are inclined to try to exclude gain on additional residences (such as vacation homes) after meeting the technical occupancy requirements.<sup>7</sup>

### *Guinan v. United States*

The May, 2003, U.S. District Court case of *Guinan v. United States*<sup>8</sup> provided the first test of the new regulations. In that case, the taxpayers owned three residences—one in Wisconsin, one in Georgia and one in Arizona. Sale of the Wisconsin residence was the focus of the case.

It was conceded that the taxpayers used the Wisconsin residence for two or more of the five-year period before sale.<sup>9</sup> Indeed, it was undisputed that the taxpayers physically occupied their Wisconsin residence for 847 days, their Georgia residence for 563 days and the Arizona residence 375 days during the five-year period. Thus, the taxpayers spent more time in the Wisconsin house than either of the other two residences.

The court agreed with the government that time spent in the residence is a major factor, if not the most important factor, in determining whether that residence is

\* Charles F. Curtiss Distinguished Professor in Agriculture and Professor of Economics, Iowa State University; member of the Iowa Bar.

the principal residence.<sup>10</sup> In applying the other factors from the regulations,<sup>11</sup> the court held that those factors, taken as a whole, did not establish that the Wisconsin house was the taxpayer's principal residence during the five years in question. As the court stated:

"First, a majority of the relevant factors do not actually favor any one of the residences as being the principal residence: the location of the plaintiffs' recreational and other activities do not favor Wisconsin since the evidence reflects activities in both Wisconsin and Georgia, *e.g.*, while Mr. Guinan served on the board of their Wisconsin homeowners' association and the plaintiffs returned to Wisconsin during the winter months for major holidays and to attend Green Bay Packers games, both of the plaintiffs were actively involved in tennis activities in Georgia and Mr. Guinan lectured at local Georgia colleges; the location of the principal abodes of the plaintiffs' children do not favor any of the residences since none of the children then lived in Wisconsin, Georgia, or Arizona; the location where the plaintiffs received their mail and did their banking does not favor Wisconsin since the plaintiffs received mail and had bank accounts at each residence; and the location where the plaintiffs registered their vehicles does not favor Wisconsin since while the plaintiffs kept one car and two boats in Wisconsin, they kept two cars at their Georgia house and then at their Arizona house.

"Second, other important factors, however, definitely point to the Wisconsin residence as not being the plaintiffs' principal residence in that, during the relevant time period, neither plaintiff filed any Wisconsin state tax return but did file Georgia and/or Arizona state returns, neither plaintiff was registered to vote in Wisconsin but both were registered in Georgia and then in Arizona, neither plaintiff had a Wisconsin driver's license but both had a Georgia license and then an Arizona license, and the plaintiffs treated their Arizona house as their principal residence for the 1999 tax year for purposes of the now-repealed 26 U.S.C. § 1034(a)."

"Third, the one relevant factor decidedly favoring Wisconsin as the principal residence, *i.e.*, the imposing size of the Wisconsin house, is insufficient as a matter of law to overcome the facts and circumstances establishing that Wisconsin was not the plaintiffs' principal residence for purposes of § 121(a)."<sup>12</sup>

The court concluded that the taxpayers had failed to meet the burden of proving that the Wisconsin house was their principal residence.

### Possibility of no principal residence

The court's conclusion in *Guinan v. United States*,<sup>13</sup> that a majority of the relevant factors do not favor any of the residences as being the principal residence, raises important questions for taxpayers who are inclined to attempt successive sales of their various residences with an expectation that the \$250,000 (\$500,000 on a joint return) exclusion would be available for each residence. It is entirely possible that none of the taxpayer's residences would qualify for the exclusion unless activities are

planned very carefully with time of occupancy, place for filing of federal and state tax returns, driver's license, automobile registration, voter registration, address for bills, the address for correspondence, location of banks, location of religious organizations and recreational clubs all planned to meet the demanding tests in the regulations.<sup>14</sup> That hazard surfaced earlier in court decisions under the sale-and-reinvestment rules for principal residences (which were repealed in 1997).<sup>15</sup>

Certainly, taxpayer behavior should be planned and shaped with the regulations in mind if sale of more than one residence is ultimately contemplated. *Guinan v. United States*<sup>16</sup> stands for the proposition that it is entirely possible to end up with no principal residence for purposes of the exclusion.

### FOOTNOTES

<sup>1</sup> T.D. 9030, 67 Fed. Reg. 78,358, Dec. 24, 2002. See Harl, "More Detail on the Principal Residence Exclusion," 14 *Agric. L. Dig.* 9 (2003).

<sup>2</sup> *Guinan v. United States*, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,475 (D. Ariz. 2003). See generally 6 Harl, *Agricultural Law* § 48.02[5][a] (2003); Harl, *Agricultural Law Manual* § 6.03[2] (2003).

<sup>3</sup> See note 1 *supra*.

<sup>4</sup> Treas. Reg. § 1.121-1(b)(2).

<sup>5</sup> Treas. Reg. § 1.121-1(b)(2).

<sup>6</sup> *Id.*

<sup>7</sup> See I.R.C. § 121(a).

<sup>8</sup> 2003-1 U.S. Tax Cas. (CCH) ¶ 50,475 (D. Ariz. 2003).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Treas. Reg. § 1.121-1(b)(2). See note 5 *supra* and accompanying text.

<sup>12</sup> *Guinan v. United States*, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,475 (D. Ariz. 2003).

<sup>13</sup> *Id.*

<sup>14</sup> Treas. Reg. § 1.121-1(b)(2).

<sup>15</sup> See *Bergersen v. Comm'r*, T.C. Memo. 1995-424. See *Asher v. Comm'r*, T.C. Memo. 1998-219.

<sup>16</sup> 2003-1 U.S. Tax Cas. (CCH) ¶ 50,475 (D. Ariz. 2003).

### American Agricultural Law Association Annual Educational Conference

October 17 and 18, 2003 San Antonio, Texas

To receive a program brochure and registration information, contact AALA at [aglaw@aaea.org](mailto:aglaw@aaea.org) or by phone at (515) 956-4255. Additional information is also available at <http://www.aglaw-assn.org/>