the cost of such inventoriable items is deductible only in that year or in the year the taxpayer actually pays for the goods, whichever is later.

A taxpayer may determine the amount of the deduction for non-incidental supplies and materials by using either a specific identification method; a first-in, first-out method; or an average-cost method, if the method is used consistently.

Taxpayers wishing to change to the cash method, and not account for inventories, are to follow the automatic accounting method change procedures.[17] The "scope" limitations[18] do not apply except that, if the taxpayer is under examination, before an appeals office or before a federal court with respect to any income issue, additional filing requirements are imposed.[19] Taxpayers should write "Filed under Rev. Proc. 2002-38" at the top of their Form 3115, Application for Change in Accounting Method.

Application to farm businesses

Rev. Proc. 2002-28[20] specifically states that the revenue procedure "does not apply to a farming business (within the meaning of I.R.C. § 263A(e)(4) of a qualifying small business taxpayer)."[21] That specifically includes, in the definition of "farming business," operating a nursery or sod farm, or the raising or harvesting of trees bearing fruit, nuts or other crops or ornamental trees.[22] An evergreen tree which is more than six years old at the time severed from the roots is not treated as an ornamental tree.[23]

Despite that language, the revenue procedure acknowledges that a taxpayer engaged in the trade or business of farming generally is allowed to use the cash method of accounting "for any farming business," unless the taxpayer is required to use an accrual method of accounting[24] or is prohibited from using the cash method.[25]

Therefore, while farmers can be on cash accounting, the automatic change method under Rev. Proc. 2002-28[26] is not available to "a farming business."[27] The revenue procedure does acknowledge, however, that if a qualifying small business taxpayer is engaged in the trade or business of farming, the procedure for an automatic change in accounting from accrual to cash may apply to the taxpayer's non-farming trades or businesses, if any.[28]

FOOTNOTES

1 See Rev. Proc. 2002-28, I.R.B. 2002-18, 815. See generally, 4 Harl, *Agricultural Law*, Ch. 25 (2003); Harl, *Agricultural Law Manual* § 4.01 (2003).

2 See I.R.C. § 446.

3 Rev. Proc. 2002-28, I.R.B. 2002-18, 815.

4 *Id.*

5 North American Industrial Classification System, Office of Management and Budget (2002).

6 Rev. Proc. 2002-28, I.R.B. 2002-18, 815, Sec. 4.01(1).

7 *Id.*, Sec. 401(1)(b).

8 *Id.*, Sec. 401(1)(c).

9 See I.R.C. § 448.

10 *Id.*, Sec. 501, 502.

11 *Id.*, Sec. 501.

12 Rev. Proc. 2002-28, I.R.B. 2002-18, 815.

13 See I.R.C. § 471(a) (requires inventories "clearly to determine the income" of a taxpayer with inventories maintained conforming to "the best accounting practice in the trade or business and as most clearly reflecting income").

14 Treas. Reg. § 1.162-3.

15 Treas. Reg. § 1.162-3.

16 *Id.*

17 Rev. Proc. 2002-9, I.R.B. 2002-3, 327, as modified by Rev. Proc. 2002-19, I.R.B. 2002-13, 696. See Ann. 2002-17, I.R.B. 2002-8, 561.

18 See Rev. Proc. 2002-9, I.R.B. 202-3, 327.

19 *Id.*

20 I.R.B. 2002-18, 815.

21 *Id.* See I.R.C. § 263A(e)(4)(A) (the term "farming business" means "the trade or business of farming").

22 I.R.C. § 263A(e)(4)(B).

23 I.R.C. § 263A(e)(4).

24 See I.R.C. § 447.

25 See I.R.C. § 448.

26 I.R.B. 2002-18, 815.

27 *Id.*, Sec. 3.02.

28 *Id.*, Sec. 3.02.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

TRESPASS. A bull owned by the defendant broke through a fence on a neighbor's ranch. An employee of the neighbor, the plaintiff, was injured while helping to capture and return the bull. The plaintiff sued under a theory of strict liability created by Montana Code § 81-4-215. The trial court granted summary judgment to the defendant on the basis that the statute did not create strict liability for trespassing animals. The court noted that the statute modified the common law rule of strict liability for trespassing animals by creating a "fence out" requirement for claiming damages from trespassing animals. The statute required property owners to erect legal fences, as defined in Montana Code § 81-4-101, in order to bring an action for trespass. The court also noted that the statute stated that "the owner of the animals is liable for all damages to the owner or occupant of the enclosure." The court held that, although the statute changed who had the duty to erect the fence, the statute did not change the strict liability standard of the common law rule. Therefore, the court held that Montana Code § 81-4-215 did impose a strict liability standard on owners whose animals break through a legal fence. The case was remanded for a determination of the damages. See *Madrid v. Zenchiku Land & Livestock, 51 P.3d 1137 (Mont. 2002)*. On remand, the trial court allowed the defendant to raise the affirmative defense of assumption of risk because that affirmative defense was allowed in strict liability cases. The plaintiff petitioned the Montana Supreme Court for a writ of supervisory control. The Supreme Court granted the writ, holding that the only defense allowed by the statute was the defense of a non-legal fence. **Madrid v. Zenchiku Land & Livestock, 60 P.3d 438 (Mont. 2002).**

BANKRUPTCY

FEDERAL TAX-*ALM* § 13.03[7].*

DISCHARGE. The debtors, husband and wife had filed a previous bankruptcy case in which several years of taxes were discharged. In the three tax years that followed that case, the debtors failed to timely file their income tax returns and did not make any tax payments except under an installment agreement even though the debtors had substantial income during this period. The court held that the taxes were nondischargeable because the debtors willfully attempted to evade payment of the taxes, based on (1) the debtors' clear awareness of and ability to pay the taxes; (2) the debtors' transfer of assets to their children and lavish lifestyle, and (3) lack of records to support their characterization of financial dealings. ***In re* Hassan, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,322 (Bankr. S.D. Fla. 2003)**.

On April 15, 1997, the debtors filed their 1996 income tax return, showing taxes due of $65,472; paid $1,000; and filed an application for automatic extension of time to file a return. The extension application listed the expected taxes as zero. Three years and two weeks later, the debtors filed for Chapter 7 and sought a declaration that the 1996 taxes were dischargeable under Section 523(a)(1). The Bankruptcy Court held that the taxes were dischargeable because (1) the application for an extension was invalid because it did not state the correct taxes and was not accompanied by the full taxes owed; (2) because the extension was invalid, the due date for the return was April 15, 1997, the date of the income tax return; and (3) the tax return filing was due more than three years before the bankruptcy petition was filed. The appellate court reversed, holding (1) only the IRS can seek to declare an extension invalid; (2) an extension was not automatically invalid because it misstated the taxes owed or did not include full payment; and (3) a debtor cannot benefit from the debtor's own mistake by seeking to have a sham extension application declared invalid. ***In re* McDermott, 286 B.R. 913 (M.D. Fla. 2002)**.

ESTATE PROPERTY. The debtor and non-debtor spouse filed a joint 2001 income tax return as husband and wife. The return showed a refund was due, and the trustee received the refund payment and determined that a portion of the refund was estate property because it accrued pre-petition. The non-debtor spouse sought recovery of one-half of the amount retained by the trustee as the non-debtor's property. The non-debtor spouse did not have any taxable income in 2001 and the refund resulted in part from the non-debtor spouse's personal exemption and deductions included on the joint return. However, all of the taxes were paid from withholding on the debtor's wages. The court held that the refund was entirely funds generated by the debtor and was estate property. ***In re* Kleinfeldt, 287 B.R. 291 (Bankr. 10th Cir. 2002)**.

CONTRACTS

CONDITION OF SALE. The defendant offered several tracts of real estate for sale at auction. A written advertisement of the auction stated that any announcements made at the sale would supercede printed material, and the title insurance commitment noted that the sale of the real estate would be subject to approval by a majority vote of the defendant's board. The plaintiff reviewed the written advertisement and the title insurance commitment before the auction, and was the high bidder for two tracts of real estate. The plaintiff executed an agreement for warranty deed for the tracts and provided down payments. The defendant's board then voted to not approve the sales to the plaintiff. The plaintiff sued for specific performance. The trial court refused to order specific performance of the land, noting that (1) the auctioneer announced several times that the sale was subject to approval by the defendant's board and (2) the written sale brochure stated that announcements made the day of sale would control the terms of sale. In addition, the court noted that the title commitment stated that any sale would be subject to the defendant's approval. The case was affirmed on appeal, with the appellate court noting that the sale was clearly made subject to approval and that the approval never came. The court pointed out that, in general, the owner of property sold at auction has the right to prescribe, within reasonable limits, the manner, conditions and terms of sale. **Money v. Fort Hays State University Endowment Association, No. 89,116 (Kan. Ct. App. Feb. 28, 2003).**

FEDERAL AGRICULTURAL PROGRAMS

CHECKOFF. The plaintiffs were dairy farmers subject to assessment under the Dairy Promotion and Research Program. A portion of the funding of that program was spent on generic advertising of milk and milk products. The plaintiffs objected to the assessment as violating their First Amendment free speech rights because the plaintiffs believed their milk was of a superior quality and the advertisements did not distinguish between the different qualities of milk. The court examined the extent of federal regulation of the dairy industry and found a pervasive program which regulated the price, marketing and production of milk throughout the country. The court then compared the degree of federal milk regulation to the peach and nectarine regulation described in *Glickman v. Wileman Bros. & Elliott, 521 U.S. 457 (1997)* and the mushroom regulation in *United States v. United Foods, Inc., 533 U.S. 405 (2001)*. See Harl, "Future of Commodity Check-Offs," 12 Agric. L. Dig. 113 (2001).The court held that the federal milk regulatory program was as pervasive as the peach and nectarine program; therefore, the milk advertisement program was economic speech not protected by the First Amendment. As economic speech, the advertising program was subject to a three part test established by the Court in Glickman. The court held that (1) the milk advertising program did not impose a restraint on the plaintiffs' freedom to communicate any message; (2) the milk advertising program did not compel the plaintiffs to engage in any actual or symbolic speech; and (3) although the program did compel the plaintiffs to finance the advertising (assumed by the court to be ideological views), the advertising was germane to the overall milk program's purpose of increasing demand for milk. Because the advertising program met all three factors, the court held that the assessments were not unconstitutional because they funded generic milk advertisements. **Cochran v. Veneman, No. 4:CV-02-0529 (M.D. Pa. March 4, 2003)**.

FEDERAL ESTATE AND GIFT TAX

ANNUITY. Prior to October 1979, the decedent purchased an annuity which provided for payment of the annuity account to a trust if the decedent died before the first annuity payment. The decedent died before the first annuity payment. The IRS ruled that neither *Rev. Rul. 79-335, 1979-2 C.B. 292* or I.R.C. § 72(s)(1)(B) applied to the annuity because the annuity contract was entered into prior to October 1979. Thus, under *Rev. Rul. 70-143, 1970-1 C.B. 167*, the trust's basis in the annuity account received was the fair market value of the annuity account on the date of the decedent's death or the alternate valuation date, as elected by the decedent's estate. **Ltr. Rul. 200311030, Dec. 16, 2002**.

ESTATE TAX. The decedent was predeceased by a spouse whose estate was less than $600,000, resulting in no federal estate tax. The decedent received all of the predeceased spouse's estate and had an estate tax liability of just over $100,000. The decedent's estate argued that the estate tax was a violation of the equal protection rights because the combined estates were less than $1,200,000 and the decedents' estates were unable to completely use the unified credit to avoid estate tax. The estate claimed that the decedents did not have the education to be aware of the estate planning available which would have reduced their estate taxes. The court noted that the estate failed to prove that the decedents were unaware of the potential estate planning savings and held that the imposition of the estate tax was not a constitutional violation. The appellate court affirmed in an opinion designated as not for publication. **Estate of Koester v. Comm'r, 2003-1 U.S. Tax Cas. (CCH) ¶ 60,459 (9th Cir. 2003), *aff'g*, T.C. Memo. 2002-82**.

VALUATION OF PARTNERSHIP INTEREST. The decedent's estate include an interest in a limited partnership. After an audit of the estate tax return, the IRS issued a deficiency notice based on a higher valuation than claimed by the estate. The Appeals Officer telephoned the estate's counsel with a proposed valuation and faxed supporting documents after the conversation; however, the fax used the date of creation value instead of the date of death value, which was higher. The estate's counsel realized the mistake but attempted to seek enforcement of the lower value as a basis of settlement. The court held that both parties realized that the lower figure was in error; therefore, no "meeting of the minds" had occurred to create a binding settlement and the estate could not use the faxed valuation amount as an agreement. **Estate of Halder v. Comm'r, T.C. Memo. 2003-84**.

FEDERAL INCOME TAXATION

LEGISLATION. Senator Charles Grassley of Iowa has introduced legislation which includes (1) provisions for farm and ranch risk management accounts (FARRM accounts) which allow deductions for contributions up to 20 percent of farm income; (2) treating CRP payments as payments from rental of real estate for purposes of I.R.C. § 1402(a)(1); (3) exemption of small issue agriculture bonds from the state volume cap; (4) removal of farm income averaging from increasing alternative minimum tax; (5) allowing four years, instead of two years, for the replacement of livestock sold because of weather-related conditions; (6) allowing agricultural cooperatives with organic value-added practices to be exempt from regular corporate tax; and (7) allowing charitable deductions to farmers for contributions of food directly to food banks. **Sen. 665**.

ABANDONMENT. The corporate taxpayer owned commercial real property and business equipment leased to another professional corporation which operated a sole practitioner law practice. The law corporation had obtained the assets and liabilities of a law partnership owned by the lawyer who was the sole shareholder of the law corporation and the taxpayer. The lawyer's license was suspended for 90 days and the lawyer sold the law corporation to another lawyer. The taxpayer claimed a loss deduction for abandonment for the business equipment and intangible property, client lists and goodwill, leased to the law corporation. The court noted, however, that the ownership of the intangible property was not clear because the law corporation also claimed an interest in the intangibles. The court denied the abandonment loss deduction because the taxpayer failed to demonstrate any ownership interest or value in the intangible property and that the property was worthless. The court noted that the license suspension of the shareholder did not affect the value of the property because the taxpayer's income from the leases increased during the tax year involved. **JHK Enterprises, Inc. v. Comm'r, T.C. Memo. 2003-79**.

ALTERNATIVE MINIMUM TAX. The taxpayer had claimed the standard deduction on the taxpayer's personal income tax return because the taxpayer's taxable income limited the taxpayer's deductible itemized deductions to an amount less than the standard deduction. The IRS required the taxpayer to submit Form 6251 to calculate any alternative minimum tax. The taxpayer filled out the form and used the itemized deductions to determine the alternative minimum taxable income, which resulted in no alternative minimum tax. The court held that the taxpayer was required to calculate the AMTI using the same standard deduction as used on the income tax return. **Marx v. Comm'r, T. C. Summary Op. 2003-23**.

CAPITAL ASSETS. The taxpayers, husband and wife, won over $1 million in a state lottery, payable in 20 annual installments. The taxpayers borrowed money and used 12 of the installments as security for the loans. The taxpayers then assigned their interest in the 12 payments in exchange for a lump sum, a portion of which was used to pay off the first loan. The taxpayer argued that the 12 payments were capital assets and that any gain or loss was capital gain or loss and any interest paid was deductible investment interest. The court held that the 12 payments were ordinary income and any gain or loss from the assignment of the payments was ordinary gain or loss. The taxpayers also argued that the interest was deductible as qualified residential interest because the wife used a portion of their residence for business use. The court held that the interest was not deductible because the taxpayers failed to demonstrate that any of the loan proceeds was used for the business. **Boehme v. Comm'r, T.C. Memo. 2003-81**.

COURT AWARDS AND SETTLEMENTS. The taxpayer entered into a contract to provide research services to a company in exchange for annual payments and 15 percent of any profits from products developed by the taxpayer. The relationship deteriorated and the taxpayer sued the company for 16 causes of action in contract. The company countersued for similar causes of action in contract. The parties negotiated a settlement after the mediator suggested that the taxpayer be allowed to amend the complaint to include a cause of action for physical injury. The amendment was made and the case was immediately dismissed with the settlement. The taxpayer argued that the settlement proceeds were excludible from taxable income a payments received for physical injuries. The court noted the suspicious last-minute addition of the physical injury claim merely to create an income tax effect and held that the settlement proceeds were includible in income because they were not related to any physical injury claimed by the taxpayer. The court also held that the proceeds represented lost income to the taxpayer and were taxable as self-employment income from the taxpayer's research business. **Emerson v. Comm'r, T.C. Memo. 2003-82**.

DEPRECIATION. The taxpayer was a corporation which owned and operated a furniture manufacturing and selling business. Some of the manufacturing equipment owned by the taxpayer was located outside the United States and was used by another business to make furniture sold by the taxpayer. The IRS issued a deficiency to the taxpayer based on reduced depreciation deductions resulting from reclassification of the manufacturing equipment under the MACRS. The IRS also determined that the change in depreciation deductions was a change in accounting method for which an adjustment pursuant to I.R.C. § 481(a) was required. The taxpayer agreed that the IRS depreciation calculation method was correct but objected to the change being characterized as a change of accounting method. The court held that a reclassification of depreciable property was not a change in method of accounting. **Green Forest Manufacturing, Inc. v. Comm'r, T.C. Memo. 2003-75**.

EARNED INCOME CREDIT. The taxpayer identified two qualifying children in claiming earned income credit for 1998. The taxpayer was the biological father of only the first child but both children had the same mother. The taxpayer was never married to the mother of the children. The taxpayer was not related to the second child and had not adopted that child. The taxpayer demonstrated that both children lived with the taxpayer for nine months in 1998. The court held that the first child was a qualifying child because the child was the biological child of the taxpayer and lived with the taxpayer for most of the tax year. The second child was held not to be a qualifying child because the child did not live with the taxpayer for the entire year. **Coats v. Comm'r, T.C. Memo. 2003-78**.

EMPLOYEE BENEFITS. The taxpayer sponsored an employee welfare benefit plan that provided long term disability coverage for all of its eligible employees under a group insurance policy issued by a third-party insurance carrier. Under the plan, employees could pay the premium for coverage on an after-tax basis or the taxpayer would pay the premium for coverage, which was not included in the gross income of the employees. Under the plan, employees had to decide each year whether to have the taxpayer pay the group disability insurance premiums charged by the third-party carrier or to pay the insurance premium themselves, with after-tax dollars. Under the plan, employees decided, in writing or through electronic delivery prior to the beginning of each plan year during which the payments were made, to either have the taxpayer pay for the long-term disability coverage or to have the premium amounts included in their gross income. An election was irrevocable for the plan year once the plan year began. Eligible employees were able to make a new premium payment election for the following plan year prior to the beginning of the next plan year. The IRS ruled that (1) long-term disability benefits paid to an employee who has decided, under the plan, to have the premiums included in gross income for the plan year in which he or she becomes disabled, are attributable solely to after-tax employee contributions and are excludable from the employee's gross income under I.R.C. § 104(a)(3); and (2) long-term disability benefits paid to an employee who has decided, under the plan, to have the taxpayer pay the premiums for the plan year in which he or she becomes disabled, are attributable solely to taxpayer contributions and are includible in the employee's gross income under I.R.C. § 105(a). **Ltr. Rul. 200312001, Nov. 13, 2002**.

MARKET SEGMENT SPECIALIZATION PROGRAM GUIDES. The IRS has issued Market Segment Specialization Program audit guide for the poultry industry. The guide highlights issues specific to or that have a significant impact on the poultry industry. Most issues in the guide relate directly to major companies rather than individual farmers. However, one chapter deals with issues normally found in connection with a poultry grower audit. **IRPO ¶ 216,251**.

The IRS has issued Market Segment Specialization Program audit guide for the swine industry. The guide identifies potential issues that impact the swine industry and notes that examiners may encounter similar basic concepts in the industry, from a small farm operation to a large corporation. Issues specific to the swine industry that the guide addresses include accrual versus cash method of accounting; farm price inventory; unit livestock fee; prepaid feed; income from discharge of indebtedness; selection fees; depreciation; grower issues; penalties; research credits; employment taxes; and excise taxes. **IRPO ¶ 217,971**.

The IRS has issued Market Segment Specialization Program audit guide for the retail gas industry. The guide contains sections dealing with background information regarding the industry, pre-audit techniques, audit techniques, and other considerations, including: inadequate records notice, fraud, nonfilers, preparer penalties, collection , bribery awareness, bankruptcy, employment tax issues, division counsel and appeals, and excise tax specialists. **IRPO ¶ 205,001**.

The IRS has issued Market Segment Specialization Program audit guide designed to assist examiners in classifying and examining partnership returns. The focus is on issues that fall within Code Secs. 701 through 761 (Subchapter K). Subchapter K deals primarily with the formation, operation, and termination of partnerships. The guide notes that many issues arise during the initial or final year of a partnership. **IRPO ¶ 215,971**.

PARTNERSHIPS

DISTRIBUTIONS OF CONTRIBUTED PROPERTY. The IRS has adopted as final regulations involving situations where a corporation owns a direct or indirect interest in a partnership that owns stock in that corporation, the partnership distributes money or other property to another partner and that partner recognizes gain on the distribution during a year in which the partnership does not have an election under I.R.C. § 754 in effect, and the partnership subsequently sells or exchanges the stock. The IRS stated that, in these situations, it may be inconsistent with the intent of I.R.C. §§ 705, 1032 to increase the basis of the corporation's partnership interest by the full amount of any gain resulting from the partnership's sale or exchange of the stock which is not recognized by the corporation under I.R.C. § 1032. Accordingly, the amended regulations revise the purpose statement of Treas. Reg. § 1.705-2(a) to take into account situations involving such partnership distributions. The regulations provide a specific rule implementing the revised purpose in single partnership cases. The regulations also revise Treas. Reg. § 1.705-2(c) to clarify that the tiered partnerships rule applies to situations involving such partnership distributions. In addition, the regulations clarify that references in the regulations to stock of a corporate partner include any position in stock of a corporate partner to which I.R.C. § 1032 applies. **68 Fed. Reg. 12815 (March 18, 2003)**.

RETURNS. The IRS has issued a list of addresses to be used for various elections, statements and other documents required to be filed with the IRS. The address changes resulted from the reorganization of the IRS from national, regional and district offices to offices serving particular industries and groups of taxpayers. **Notice 2003-19, I.R.B. 2003-__**.

The IRS has announced that automatic four-month extensions of time to file are currently available by phone, computer, or by filing Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return. **IR-2003-36**.

The IRS released advice to last-minute tax return filers: use electronic filing now and, if they owe the IRS money, set the automatic payment for April 15; use free software and IRS resources for help; gather all necessary documents before preparing the return; and file for an extension if necessary. IR-2003-40.

S CORPORATIONS

SHAREHOLDER BASIS. The taxpayers were shareholders of an S corporation who had claimed pass-through loss deductions. The shareholders claimed to have made capital contributions and loans to the corporation which increased their bases in their stock. The taxpayers evidence of capital contributions and loans was only a disorganized collection of checks and business records. The court noted that even if the checks were loans or contributions to the corporation, the taxpayers failed to provide any evidence that the loans were still outstanding at the end of the tax year or that the contributions had not been repaid; therefore, the IRS disallowance of the loss deduction was upheld. **Bone v. Comm'r, 2003-1 U.S. Tax Cas. (CCH) ¶ 50,323 (11th Cir. 2003),** ***aff'g*****, Bone v. Comm'r, T.C. Memo. 2001-43 and Guerrero v. Comm'r, T.C. Memo. 2001-44**.

SAFE HARBOR INTEREST RATES

April 2003

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	1.46	1.45	1.45	1.45
110 percent AFR	1.61	1.60	1.60	1.59
120 percent AFR	1.75	1.74	1.74	1.73
		Mid-term		
AFR	2.96	2.94	2.93	2.92
110 percent AFR	3.26	3.23	3.22	3.21
120 percent AFR	3.56	3.53	3.51	3.50
		Long-term		
AFR	4.58	4.53	4.50	4.49
110 percent AFR	5.04	4.98	4.95	4.93
120 percent AFR	5.51	5.44	5.40	5.38

Rev. Rul. 2003-35, I.R.B. 2003-__.

SECURED TRANSACTIONS

WRONGFUL DETENTION. The plaintiff was a bank which had obtained a perfected security interest in all of a farmer's farm equipment. The farmer had purchased a tractor with a loan from another creditor and that tractor was destroyed in a fire. The farmer obtained insurance proceeds which paid the loan and provided proceeds to the farmer which were used to purchase a replacement tractor. The bank sought to foreclose its security interest in the tractor and brought a foreclosure suit. Before that suit was resolved in favor of the plaintiff, the farmer sold the tractor to the defendant. The bank then sought recovery of the tractor from the defendant and obtained a court order allowing the repossession. The plaintiff had the sheriff send deputies to repossess the tractor but the deputies could not find the VIN on the tractor and did not repossess the tractor. The plaintiff eventually obtained the tractor and the defendant sought a summary judgment that no damages were awardable because the defendant did not wrongfully possess the tractor. The court noted that no court order was issued to the defendant to return the tractor, the defendant did not refuse to allow the deputies to repossess the tractor, and the defendant was not a party to any proceeding involving the plaintiff and the farmer. Therefore, the court held that the plaintiff was not entitled to any damages from the defendant for wrongful detention of the tractor. **1st Bank v. Winderl, 60 P.3d 998 (Mont. 2002)**.

STATE REGULATION OF AGRICULTURE

CHECKOFF. The plaintiffs were organic apple growers who sought an injunction against their assessment by the Washington State Apple Advertising Commission (WSAAC) of 25 cents per box which was used to promote the sale of Washington state apples. The plaintiffs argued that the assessment violated the Fifth Amendment right of free speech. The court first held that its jurisdiction was not barred by the Washington Tax Injunction Act because the assessments were not taxes. The court also held that the WSAAC promotion program was not governmental speech because the WSAAC was not a government agency. Although the court recognized that the apple industry was highly regulated in Washington, the regulation did not create a collectivization of the marketing of the apples; therefore, the holding in *United States v. United Foods, Inc., 533 U.S. 405 (2001)* applied to the WSAC assessments. Because the plaintiffs were likely to prevail on the unconstitutionality of the assessment, the court awarded a preliminary injunction pending trial. ***In re* Washington State Apple Advertising Commission, No. CS-01-0278-EFS (E.D. Wash. March 14, 2003)**.

CITATION UPDATES

***In re* Izzo, 287 B.R. 158 (Bankr. E.D. Mich. 2002)** (discharge of tax claim) see p. 20 *supra*.

IN THE NEWS

GENETICALLY MODIFIED ORGANISMS. Legislation has been introduced into the Kansas Senate that would establish an application and certification procedure for those wanting to conduct research on genetically modified organisms (GMOs) or wanting to introduce them into the state. As presently drafted, however, it is uncertain precisely when an application is required. Presumably, an application is required for both introduction and research activities. Under the bill, the Secretary of Agriculture is to develop a mailing list of persons who wish to be informed when an application has been submitted, and the department of agriculture has the sole authority to conduct a review of an application. However, there is no procedure for public input into the process until after the department has completed its review and filed a report concerning the marketability impact of the GMO. The bill also specifies that the manufacturer of a GMO is to be liable for damages incurred by cross contamination or for other damages incurred through the use of the GMO. **Senate Bill No. 236, introduced February 14, 2003.**

HEDGE-TO-ARRIVE CONTRACTS. An Administrative Law Judge has ruled that a seller of hedge-to-arrive contracts did not engage in the offering of illegal, off-exchange futures or options. However, the seller was ruled to have made fraudulent solicitations and misrepresentations in selling the hedge-to-arrive contracts. **In the Matter of Roger J. Wright, et al., CFTC Docket No 97-2**.

PESTICIDES. In a Feb. 28, 2003 ruling of the Federal District Court for the Eastern District of New York, the court granted class certification to commercial lobstermen around Long Island Sound who claim their lobster harvest was severely reduced in 1999 as a result of pesticide applications to control West Nile Virus in metro NYC. The class includes more than 300 fishermen. Tropical Storm Floyd (9/15-17/99) apparently washed pesticides into Long Island Sound and killed a large amount of lobsters such that the lobster catch decreased from 5.6 million pounds in 1998 to 1.7 million pounds in 2000. The defendant chemical companies are challenging causality, but the court said the merits of the case are immaterial when class certification is being considered. **Fox v. Cheminova, No. CV-00-5145 (E.D. N.Y. Feb. 28, 2003)**.

The plainitffs were a national class of farmers who purchased the herbicide Poast, manufactured by the defendant. The plaintiffs charged that the defendant fraudulently marketed Poast and a less expensive version, Poast Plus, differently even though both products were the same and both received EPA registration. Evidence showed that the defendant advertised that only Poast was registered with EPA, that the defendant used mailings, processors and dealers to warn farmers of “off-label” use of Poast Plus. Also, the defendant had state inspectors investigate the defendant’s dealers for selling Poast Plus to certain crop farmers, which led to fraudulent criminal prosecutions. Evidence also showed that the defendant lied to the North Dakota Pesticide Control Board to conceal the fact that Poast Plus was EPA-registered for the same crops as Poast. The jury returned a verdict for the farmer-class awarding damages of $15,000,000. The court tripled the damages and added costs, pushing the award to $53 million. On appeal, the court affirmed the award and the certification of the class. **Peterson, et. al. v. BASF Corp., No. C3-02-857 (Minn. Ct. App. Mar. 11, 2003)**.

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AGRICULTURAL TAX AND LAW SEMINARS

by Neil E. Harl and Roger A. McEowen

April 28, 29, 30, May 1, 2003 Plaza Inn, Garden City, KS

Come join us for expert and practical seminars on the essential aspects of agricultural tax and law. Gain insight and understanding from two of the nation's top agricultural tax and law instructors. The seminars are held on Monday, Tuesday, Wednesday, and Thursday. Registrants may attend one, two, three or all four days, with separate pricing for each combination. On Monday, Dr. Harl will speak about farm and ranch income tax. On Tuesday, Dr. Harl will cover farm and ranch estate planning. On Wednesday, Roger McEowen will cover farm and ranch business planning. On Thursday, Roger McEowen will cover agricultural law developments for 2002-2003. Your registration fee includes comprehensive annotated seminar materials for the days attended and lunch. The seminar registration fees for *current subscribers* to the Agricultural Law Digest, the Agricultural Law Manual, or Principles of Agricultural Law (and for multiple registrations from one firm) are $185 (one day), $360 (two days), $525 (three days), and $670 (four days). The registration fees for *nonsubscribers* are $200, $390, $570 and $720, respectively.

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August 12-15, 2003 Holiday Inn I-25, Fort Collins, CO
September 26-29, 2003 Interstate Holiday Inn, Grand Island, NE

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October 23, 2003: "Farm & Ranch Income Tax" by Neil E. Harl
October 24, 2003: "Farm & Ranch Estate and Business Planning" by Roger A. McEowen
Spa Resort, Palm Springs, CA

Registrants may attend either or both days. The registration fee includes comprehensive annotated seminar materials for the days attended which will be updated just prior to the seminar. The seminar registration fees for *current subscribers* to the Agricultural Law Digest, the Agricultural Law Manual, or Principles of Agricultural Law (and for each registrant for multiple registrations from one firm) are $185 for one day and $360 for both days. The registration fees for *nonsubscribers* are $200 for one day and $390 for both days.

Registration brochures will be mailed to all subscribers. In addition, complete information and a registration form are available now on our web site at http://www.agrilawpress.com. For more information, call Robert Achenbach at 1-541-302-1958, or e-mail to **robert@agrilawpress.com**

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