may be enforced either before or after the Medicaid recipient's death by the filing of an action to foreclose the lien in the county district court (or through an estate probate court action), it may be enforced only after the death of the recipient's surviving spouse and (1) when there is no child who is 20 years old or less residing in the home; (2) when there is no adult child who is blind or disabled that resides in the home, and (3) when there is no brother or sister of the Medicaid recipient that lawfully resides in the home who has resided there for at least a year immediately before the date of the Medicaid recipient's admission to the nursing or medical facility, and has resided there on a continuous basis since that time.

[5] 42 U.S.C. § 1396p(a)(1).

[6] *Id.*

[7] 42 U.S.C. § 1396k(a)(1) provides that, as a condition of eligibility, the individual must assign to the state any rights to payment for medical care from any third party.

[8] Under the typical state statute, the lien is dissolved if the Medicaid recipient leaves the nursing facility and resides in the property subject to the lien for a period of more than 90 days without being readmitted as an inpatient to a nursing or medical facility, even though there may have been no reasonable expectation that this would occur. See, e.g., *Kan. Stat. Ann. § 39-709(6)(D)*. If the Medicaid recipient is readmitted to a nursing or medical facility during this period, and does return home after being released, another 90 days must be completed before the lien can be dissolved. *Id.* The lien also becomes dormant and ceases to operate as a lien if the state Medicaid agency does not take action to foreclose the lien within 10 years of filing the lien. *Id.* The dormant lien may be revived in the same manner as a dormant judgment is revived under Kansas law. *Id.*

[9] Arkansas Department of Health and Human Services, et al. v. Ahlborn, 126 S.Ct. 1752 (2006).

[10] *Id.*

[11] See 42 U.S.C. § 1396p(a).

[12] Ahlborn v. Arkansas Department of Health and Human Services, 280 F. Supp. 2d 881 (E.D. Ark. 2003).

[13] *Id.*, 397 F.3d 620 (8th Cir. 2005).

[14] *Id., cert. granted,* 126 S. Ct. 35 (2005).

[15] Arkansas Department of Health and Human Services, et al. v. Ahlborn, 126 S.Ct. 1752 (2006).

[16] 126 S.Ct. 1752 (2006).

[17] Kan. Stat. Ann. § 39-709(4).

[18] Iowa Code § 249A.6(1).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ADVERSE POSSESSION

PRESCRIPTIVE ACQUISITION. Note: prescriptive acquisition is a civil law doctrine similar to adverse possession. The plaintiffs owned land south of the disputed property which had been in the family since 1940. The plaintiffs presented evidence that the disputed property had been used by family members since that time for recreation, pasture, hunting and farming. The defendants purchased their land neighboring the disputed property in 1963 and claimed that purchase included the disputed property. The defendants paid taxes on the disputed property from that time and argued that the purchase of the property interrupted the adverse possession of the disputed property by the plaintiffs. The defendants acknowledged that they had not exercised physical occupation of the land but argued that the payment of taxes and occasional viewing of the land were sufficient to maintain title to the land. The defendant also pointed to the fact that when they purchased their land in 1963, an ancestor of the plaintiffs had offered to buy the disputed property from the defendants, indicating that the plaintiffs knew that they did not own the land. Finally, the defendants had executed mineral leases for the disputed property and argued that all of their actions involving the property interrupted the plaintiff's possession of the land. The court held that the activities of the plaintiffs were sufficient exercise of control over the property for over 30 years to pass title to them under prescriptive acquisition. The court noted that, even if the actions of the defendants interrupted the plaintiffs' possession, the plaintiffs' activities on the disputed property re-established control and possession within one year and, under La. Civ. Code art. 3465, repossession within one year removes the interruption. **Prince v. Palermo Land Co., 2006 La. App. LEXIS 1022 (La. Ct. App. 2006)**.

ANIMALS

BULL. The plaintiff was working with a carpenter in repairing the cow barn for the defendant. The defendant did not know that the plaintiff was present on the farm or that the plaintiff was working in the cow barn. The plaintiff and the carpenter did not know that the defendant had a dairy bull loose with the other dairy cows. The plaintiff was injured by the defendant's dairy bull while working in the barn and filed suit in strict liability and negligence against the defendant and carpenter for the cost of the injuries. Applying the Restatement (Second) of Torts § 509, the court held that the standard of care for owners of domestic farm animals was that the owner would be liable for harm caused by animals which the owner knew had vicious propensities. The court held that the defendant was not liable for the plaintiff's injury because the evidence demonstrated

that the bull had never attacked any person before the accident. The plaintiff argued that bulls were inherently dangerous so as to require a higher standard of care, but the court held that the rule in New York was that no breed of animal was considered inherently vicious such that an owner would be deemed to have knowledge of vicious propensities. **Bard v. Jahnke, 2006 N.Y. LEXIS 957 (N.Y. Ct. App. 2006), *aff'g*, 791 N.Y.S.2d 694 (N.Y. App. Div. 2005)**.

BANKRUPTCY

FEDERAL TAX

DISCHARGE. The debtors, husband and wife, filed for Chapter 13 and were granted a discharge. After the case was closed, the debtors filed a proceeding in the Bankruptcy Court against the IRS for the release of a federal tax lien against their residence involving a tax claim discharged in the Chapter 13 proceeding. The Chapter 13 plan provided that, upon payment of the IRS claim, the tax lien would be considered void. The plan valued the tax claim at zero because the IRS did not file a proof of claim for the underlying tax in the case, although it did file a proof of claim for other taxes; therefore, the debtors argued, the lien was void when the case was closed. The court acknowledged that liens are not affected by bankruptcy proceedings unless the debtors take some action to either pay the underlying claim or otherwise avoid the lien. The court held that the IRS lien was voided by the bankruptcy plan which specifically listed the tax claim and the tax lien. Because the IRS failed to object to the bankruptcy plan, the IRS was bound by the terms of the plan and was required to release the lien, because the plan not only discharged the tax claim but also provided for release of the lien upon discharge. **I.R.S. v. DiPasquale, 2006-1 U.S. Tax Cas. (CCH) ¶ 50,318 (D. N.J. 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

DISASTER PROGRAMS. The FSA has issued interim regulations establishing disaster relief programs for agricultural producers who suffered losses in Hurricanes Dennis, Katrina, Ophelia, Rita and Wilma in Alabama, Florida, Louisiana, Mississippi, North Carolina and Texas. The regulations also provide for grants to states to assist aquaculture producers who suffered losses from the hurricanes. **71 Fed. Reg. 27188 (May 10, 2006)**.

FARM LABOR. The National Agricultural Statistics Service has issued farm employment figures as of April 15, 2006. There were 956,000 hired workers on the nation's farms and ranches the week of April 9-15, 2006, down 4 percent from a year ago. Of these hired workers, 718,000 workers were hired directly by farm operators. Agricultural service employees on farms and ranches made up the remaining 238,000 workers. Farm operators paid their hired workers an average wage of $9.79 per hour during the April 2006 reference week, up 44 cents from a year earlier. Field workers received an average of $8.96 per hour, up 40 cents from April 2005, while livestock workers earned $9.30 per hour compared with $9.14 a year earlier. The field and livestock worker combined wage rate, at $9.07 per hour, was up 35 cents from last year. The number of hours worked averaged 40.8 hours for hired workers during the survey week, up 2 percent from a year ago. All NASS reports are available free of charge on the internet. For access, go to the NASS Home Page at: http:/www.usda.gov/nass/. **Sp Sy 8 (5-06).**

GUARANTEED LOANS. The FSA has issued proposed regulations which amend the guaranteed farm ownership and operating loan programs to change the amount of interest charged and collected on the loans. The one-time origination fee for guaranteed farm ownership loans will be increased from 1 percent to 1.5 percent. In addition, an annual continuation fee of 0.75 percent will be charged for lines of credit for farm operating loans. Such fees will not be collected where the fees are prohibited by statute, e,g, loans to beginning farmers and ranchers under the State Beginning Farmer Program under 7 U.S.C. § 309. **71 Fed. Reg. 27978 (May 15, 2006)**.

MEAT AND POULTRY PRODUCTS. The FSIS has extended the comment period for the following proposed regulations. See *71 Fed. Reg. 11326 (March 7, 2006).* The FSIS has issued proposed regulations amending the federal meat and poultry products inspection regulations to provide that the FSIS will make available to the public lists of the retail consignees of meat and poultry products that have been voluntarily recalled by a federally inspected meat or poultry products establishment if product has been distributed to the retail level. FSIS is proposing to post routinely these retail consignee lists on its web site as the lists are developed by the agency during its recall verification activities. **71 Fed. Reg. 27211 (May 10, 2006)**.

PEAS. The GIPSA has announced that it plans to amend the U.S. standards for Whole Dry Peas and Split Peas to provide a separate standard for feed peas to accommodate the difference in the markets for feed peas and edible dry peas. **71 Fed. Reg. 27672 (May 12, 2006)**.

TOBACCO. The plaintiffs were tobacco producers who owned tobacco quotas eligible for payments under the Tobacco Transition Payment Program (TTPP) provided by the Tobacco Buyout Statute enacted as part of the American Jobs Creation Act of 2004, 7 U.S.C. § 518 *et seq*. The plaintiff filed suit for a declaratory judgment that the regulations promulgated to implement the TTPP violated the statute in that the amount paid for the quotas was less than the payments required by the statute. The current issue was the plaintiffs' request to class certification. The court granted class certification for the following class of: "all burley and flue-cured tobacco producers who contracted for payment under the Regulations (7 C.F.R. § 1463) and received less than $ 3.00 multiplied by their 2002 effective tobacco marketing quota, after being reduced or divided where applicable." The court found that (1) the class was sufficiently large so as to make joinder of all plaintiffs reasonable; (2) the class

had sufficiently common questions of law or fact; (3) the class had sufficiently similar questions of law or fact; (4) the class could be adequately represented by the major plaintiffs; and (5) the defendant has acted toward the class on grounds generally applicable to all the class members. **Neese v. Johnson, 2006 U.S. Dist. LEXIS 25344 (W.D. Va. 2006)**.

FEDERAL ESTATE AND GIFT TAXATION

CHARITABLE DEDUCTION. The decedent had created an inter vivos trust with two persons and two charities as remainder beneficiaries. After the decedent's death, the trust passed to the remainder holders in four equal shares. Each beneficiary was entitled to one-half of their one-quarter share of the trust property in 2006 and the remainder in 2016. The trust provided that, if any individual beneficiary died, that person's share would pass to the remaining beneficiaries equally. The estate claimed a deduction for the portion of the trust that was estimated would eventually be received by the charities. The IRS denied the deduction under I.R.C. § 2055(e)(2) because the trust was a split-interest trust which created interests for charities and non-charities in the the same property. The estate argued that the statute did not apply because the trust essentially created two trusts, one for the individuals and one for the charities. The court rejected that argument based on *Zabel v. United States, 995 F. Supp. 1036 (D. Neb. 1998),* which denied a charitable deduction to a similarly structured trust. The estate also argued that I.R.C. § 2055(e)(2) was ambiguous in that it did not define a split interest trust; therefore, the court should examine the legislative history to determine whether the estate's trust was intended to be covered by the statute. The court cited *Estate of Johnson v. United States*, *941 F.2d 1318, 1321 (5th Cir. 1991),* in support of its holding that the statute was not ambiguous; therefore, there was no need to discuss the legislative history of the statute. The court noted that the estate's trust did not avoid the abuses mentioned in the legislative history in that one of the individual beneficiaries could still deplete a portion of the trust by ordering the trustee to seek high income, high risk investments because all remaining property would pass to the charities and not the individual's heirs. The court held that the charitable deduction was properly denied. **Galloway v. United States, 2006-1 U.S. Tax Cas. (CCH) ¶ 60,525 (W.D. Penn. 2006)**.

INCOME IN RESPECT OF DECEDENT. The decedent's estate included a non-qualified deferred annuity contract which had no designated remainder beneficiary. The decedent had not begun receiving payments under the annuity. The estate executor transferred the annuity to a charity as part of a residuary estate bequest under the decedent's will. The issue was whether the amount of the annuity paid in excess of the decedent's investment in the annuity is income in respect of decedent only to the beneficiary of the annuity. The IRS ruled that, although I.R.C. § 691(a)(2) provides that the estate is to include the IRD from the annuity in income if the annuity is transferred, the section does not apply to transfers in satisfaction of a bequest. Thus, under I.R.C. § 691(a)(2) and Treas. Reg. § 1.691(a)-4(b)(2), if the right to the annuity is transferred to a residuary legatee, the IRD income is income of the legatee only. **Ltr. Rul. 200618023, Jan. 18, 2006**.

RETURNS. The decedent's estate was required to file an estate tax return by August 11, 2001 and was granted an extension of time to file and pay until February 11, 2002. The estate made a tax payment on March 15, 2002 and filed a return on December 4, 2002. The IRS assessed a late-filing penalty and a late payment penalty. The estate argued that the penalties were improper because (1) the estate relied on the advice of an IRS estate tax attorney that an additional automatic extension was available and (2) the estate had reasonable cause for the delay because of negotiations to sell estate property. The court granted summary judgment for the IRS, holding that (1) even if the advice of the attorney had been correct, the estate tax return was not filed within six months after the first extension expired and (2) the estate failed to provide any evidence to support its claim that the delay in selling estate assets prevented payment of the estate taxes. **Welch v. United States, 2006-1 U.S. Tax Cas. (CCH) ¶ 60,526 (D. N.J. 2006)**.

VALUATION. The taxpayers were members of a large family which owned shares of a privately owned corporation. The other shares were owned by other family members, a nonprofit organization established by the family and other independent nonprofit organizations. The corporation bylaws prohibited the sale of stock to non-family members or to organizations other than non-profit organizations. The corporation hired an independent auditor to provide an annual value for the corporation which was used in stock sales which occurred over six years prior to the gifts involved in the current case. The sales involved some family member-to-family member sales, although the relationship of some of the parties was rather distant, and some were between the organizations and family members. The annual audit valuations always included a 50 percent discount for lack of marketability and when the taxpayers filed gift tax returns for gifts of stock, they also discounted the fair market value of the stock by 50 percent. The IRS argued that the auditor's valuation should be ignored because the valuation was not reached in an arm's length negotiation. The IRS relied on its own experts who valued the stock using a 30-45 percent discount for lack of marketability. The estate used two of the stock sales in the previous six years to illustrate that the auditor's valuation was correct. The court held that the sales demonstrated that the 50 percent discount was reached in an arm's length transaction because (1) some of the sales were made under a fiduciary duty, (2) none of the sales was forced, (3) the sellers reasonably relied on the independent auditor's valuation and were not required to use that valuation, and (4) there was no demonstrated donative intent in the sales. **Huber v. Comm'r, T.C. Memo. 2006-96**.

FEDERAL INCOME TAXATION

LEGISLATION. On May 17, 2006, President Bush signed the Tax Increase Prevention and Reconciliation Act. H.R. 4297. The next issue of the *Digest* will publish a review of major portions of the legislation in an article by Roger McEowen and Neil Harl.

ACCOUNTING METHOD. The taxpayer S corporation operated several automobile retail businesses. The taxpayer valued and reported inventory values using the link-chain, dollar-value LIFO inventory method. The IRS determined that the taxpayer had improperly calculated inventory value under this method for up to 10 years and required the taxpayer to make an I.R.C. § 481 adjustment of inventory value and income for all open tax years. In addition, the IRS required the taxpayer to determine the inventory value and income for the first open tax year based on cumulative adjustments of the previous closed tax years. The court upheld the IRS determination because the taxpayer's error in applying the accounting method was a material error and not merely a mathematical or posting error. **Huffman v. Comm'r, 126 T.C. No. 17 (2006)**.

The taxpayer had been an attorney for over 30 years and decided to retire to begin a business of trading securities in 1999. The taxpayer realized short-term losses in 1999. The taxpayer had an accountant prepare the income tax return but the accountant failed to make the I.R.C. § 475(f) election for the marked-to-market method of accounting before April 17, 2000. The taxpayer hired new professional help and requested an extension of time to file the election from the IRS. Although the extension request was filed after the date for the election, the original due date for the return, the extension request was filed before the actual due date for the return because the taxpayer had filed for an automatic extension. The extension was denied because the IRS found that the taxpayer had not identified "unusual and compelling circumstances" to support an extension. The court held that Treas. Reg. § 301.9100-3 requires the IRS to grant extensions for elections if the taxpayer shows that the taxpayer acted reasonably and in good faith and the government's interests will not be prejudiced. The regulations lists five benchmarks, any one of which is sufficient to show that the taxpayer acted reasonably and in good faith. The court found that the taxpayer had reasonably relied on the advice of an accountant in filing the 1999 return and that the government's interests would not be prejudiced by an extension of time to file the election; therefore, the IRS improperly denied the extension. **Vines v. Comm'r, 126 T.C. No. 15 (2006)**.

CAPITAL ASSETS. The taxpayer had won a state lottery and received annual payments for five years before assigning the annual payments to a third party in exchange for a lump sum payment. The taxpayer reported the assignment as a sale of a capital asset with a tax basis of zero. The court, consistent with several prior cases, held that the lottery payments were not capital assets because there was no underlying investment by the taxpayer. **Watkins v. Comm'r, No. 04-9016 (10th Cir. May 10, 2006), *aff'g*, T.C. Memo. 2004-244**.

CHARITABLE DEDUCTIONS. The taxpayer purchased 29 acres of unimproved land in an historical overlay district. 15 acres of the land was in a designated floodplain. Because the land was in a historical overlay district and in a floodplain, the land was restricted as to development by county zoning laws. The taxpayer transferred a conservation easement to the county, which limited the development of the land, although the restrictions were no greater than the restrictions already imposed by county ordinance. The court held that the easement transfer was not eligible for a charitable deduction because the easement did not serve any conservation purpose required by I.R.C. § 170(h)(4)(A) since the easement did not preserve any open space, protect views of the historical areas, or protect any historical structures. **Turner v. Comm'r, 126 T.C. No. 16 (2006)**.

COURT AWARDS AND SETTLEMENTS. The taxpayer filed a suit for wrongful discharge against a former employer. The taxpayer received a settlement lump sum payment; however the payment was used to pay state and federal employment withholding taxes and attorneys' fees. The taxpayer argued that the settlement payment was either (1) not included in income because the taxpayer did not receive any benefit of the settlement or (2) should be taxed over the eight years that were used to calculate the back wages paid as part of the settlement. The court held that the settlement payment was taxable when received and was all included in the taxpayer's income because the taxpayer failed to show that the attorney had any property interest in the settlement. **Messina v. Comm'r, T.C. Memo. 2006-107**.

The taxpayer had challenged in the Tax Court an IRS assessment based on payments made by a corporation, of which the taxpayer owned 40 percent of the stock, to the taxpayer as constructive dividends. The taxpayer was successful in challenging the assessment and sought recovery of litigation costs. See *Morrison v. Comm'r, T.C. Memo. 2005-53*. However, the taxpayer acknowledged that the corporation had paid for all of the taxpayer's legal costs and would receive any litigation cost award obtained by the taxpayer. The court held that the taxpayer could not recover the litigation costs because the taxpayer did not personally pay any of the litigation costs. **Morrison v. Comm'r, T.C. Memo. 2006-103**.

DEPENDENTS. The taxpayer was a native of Sudan and worked in the United States. The taxpayer claimed unrelated children as dependents based upon the taxpayer's helping to support the children and the taxpayer's claim that, under Sudanese custom, the children were related because they were part of the same tribe as the taxpayer. The children lived with one of their biological parents in a separate apartment. The taxpayer did not provide written evidence of any payment of the children's expenses or how much support the children received from other sources, including their biological parents. The court denied the deduction because the taxpayer was not related to the children, as defined by I.R.C. § 152, and did not prove that the taxpayer provided more than one-half of the children's support or that the

children lived with the taxpayer. **Aruai v. Comm'r, T.C. Memo. 2006-98**.

IRA. The taxpayer owned three IRAs. The taxpayer received a $7,000 distribution from one IRA on February 26, 1996. The taxpayer made a contribution to another IRA of $7,000 on April 30, 1996, 64 days after the distribution. The taxpayer argued that the contribution was a rollover of the distribution from the first IRA to the second IRA and the taxpayer offered testimony as to the reason why the rollover was four days late. The court found the taxpayer's testimony inconsistent and held that the contribution to the second IRA did not qualify as a rollover and had to be included in the taxpayer's income. **Mostafa v. Comm'r, T.C. Memo. 2006-106**.

LEGAL FEES. The taxpayer was incarcerated in a state prison. The prison had restricted the mail of inmates to prohibit the receipt of any blank IRS forms. Although the taxpayer did not receive all necessary documents, the taxpayer was able to file a federal tax return for 2001. In March 2002, the taxpayer filed a suit to enjoin the prison from restricting the taxpayer's mail as to financial statements and IRS tax forms. The taxpayer then claimed the legal expenses of that filing as a deduction on the 2001 tax return, arguing that the expenses were related to the filing of the 2001 tax return. The court held that the legal expenses were eligible for a deduction only for 2002, the year in which the expenses were paid. **Dehoney v. Comm'r, T.C. Memo. 2006-108**.

LIKE-KIND EXCHANGES. The taxpayer owned a gold mine and exchanged the gold mine for a coal mine owned by an unrelated company. The coal mine assets and liabilities included supply contracts which, under New Mexico law, were considered covenants running with the real property containing the coal; therefore, the court held that the supply contracts were part of the real property exchanged for the gold mine. The court held that the exchange of the gold mine and coal mine was entitled to like-kind exchange treatment under I.R.C. § 1031. The *Digest* will publish an article on this case by Neil Harl in a future issue. **Peabody Natural Resources Co. v. Comm'r, 126 T.C. No. 14 (2006)**.

LIMITED LIABILITY COMPANIES. The taxpayer was a corporate subsidiary of a corporation which was a subsidiary of the parent corporation. The taxpayer was restructured to become the subsidiary of a new corporation which was a subsidiary of the parent corporation. The taxpayer was further restructured as a limited liability company. The taxpayer's business was the providing of truck drivers for the parent corporation's trucking business. The taxpayer received prepayments for these services. The advance payments were not determined by any advance hiring of drivers and were not refundable if drivers were not hired by the parent from the taxpayer. The IRS ruled that the advance payments were recognized as income to the taxpayer when paid because the taxpayer had full control over the funds and was not required to make any refunds. The taxpayer had adopted the deferral method of accounting but had not obtained IRS consent for the accounting change. The IRS ruled that the change in accounting method required IRS consent, under Rev. Proc. 71-21, 1971-1 C.B. 549, because the taxpayer was considered a related party to the parent corporation under I.R.C. § 482 and Treas. Reg. § 482-1(a). **T.A.M. 200619023, Feb. 1, 2006**.

RETURNS. The IRS has posted to its website, www.irs.ustreas.gov, in the Forms & Pubs section Publication 1542 (Rev. May 2006), Per Diem Rates (For Travel Within the Continental United States). There are changes in the per diem rates in Oakland, CA; Savannah, GA; Chicago, IL; Manhattan, NY; Charlotte, NC; Cincinnati, OH; Aiken, SC; and Tacoma, WA.

S CORPORATIONS

SHAREHOLDER BASIS. The taxpayers, husband and wife, owned 50 percent of a partnership and 50 percent of an S corporation. The partnership loaned money to the taxpayers who loaned the same money to the S corporation which paid the same amount in rent to the partnership. The principal and interest of the loans were not repaid. The partnership borrowed money on a nonrecourse basis from a third party and the loan agreement prohibited the partnership from using the loan proceeds in the loans described above. The agreement also required (1) the partnership to seek the lender's approval for any partnership loans to the taxpayers, (2) such loans had to be paid from partnership net profits, and (3) the loans were used to fund partnership activities. The taxpayers argued that the intercompany loans increased their basis in the S corporation because the loans were subject to collection if the partnership's loans ever defaulted. The IRS ruled that the taxpayers' intercompany loans did not increase their basis in the S corporation because the loans required no economic outlay by the taxpayers and there was an insignificant risk that the taxpayers would be held liable for the partnership loans. **Ltr. Rul. 200619021, Feb. 7, 2006**.

SAFE HARBOR INTEREST RATES

June 2006

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	4.99	4.93	4.90	4.88
110 percent AFR	5.49	5.42	5.38	5.36
120 percent AFR	6.01	5.92	5.88	5.85
		Mid-term		
AFR	5.06	5.00	4.97	4.95
110 percent AFR	5.58	5.50	5.46	5.44
120 percent AFR	6.09	6.00	5.96	5.93
		Long-term		
AFR	5.32	5.25	5.22	5.19
110 percent AFR	5.86	5.78	5.74	5.71
120 percent AFR	6.40	6.30	6.25	6.22

Rev. Rul. 2006-29, I.R.B. 2006-23.

UNRELATED BUSINESS INCOME. The taxpayer was a community college which received some unimproved real property as a gift. The property had an old dead-end street through it and the city decided to complete the street and rezone the area as commercial. The taxpayer had the property platted and divided into lots for sale. The only advertising for the sale was notices in the newspaper, although a broker was to be hired if the lots did not sell. The proceeds of the sales of the lots were to be used to

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construct a new student dormitory on campus. The IRS ruled that the proceeds of the sales would not be unrelated business income to the taxpayer. **Ltr. Rul. 200619024, Feb. 16, 2006**.

LANDLORD AND TENANT

SPECIFIC PERFORMANCE. The plaintiff entered into a five-year lease of farm land and had farmed the land for one year and paid the next year's rent in advance when the land was sold. The new owner, the defendant, entered the land and forcibly evicted the plaintiff. The plaintiff sued for reinstatement of the lease and for treble damages for forcible eviction. The trial court ruled that a valid lease existed and awarded monetary damages to the plaintiff based on one lease year. The amount of damages or how they were calculated is not disclosed in the case. The plaintiff appealed, arguing that the lease should have been reinstated because monetary damages were inadequate. The appellate court affirmed the denial of specific performance to reinstate the lease because it was not shown that monetary damages were not a sufficient remedy. The trial court had made no ruling on the treble damages for forcible eviction and the appellate court remanded the case for a determination by the trial court as to whether the defendant used or threatened to use force in the eviction of the plaintiff. The court held that treble damages were warranted even though force was not used; the plaintiff was entitled to treble damages if the threat of force was present and "justly to be feared." **Livinggood v. Balsdon, 709 N.W.2d 723 (N.D. 2006)**.

PROPERTY LAW

HUNTING. The plaintiffs were farmers who owned and operated cattle and crop raising activities on farm land and who owned and operated hunting lodges and preserves in South Dakota. The South Dakota legislature enacted S.D. Code L. § 41-9-1.1(2) which allowed the hunting of small game, except mourning doves, without a landowner's permission if (1) the game is located on a public highway or public right-of-way or (2) the game is in flight over private land if the small game originated from a highway or public right-of-way. The plaintiffs argued that the statute was an unconstitutional taking of their property rights without compensation. The court upheld the statute as constitutional in that the statute did not take any property right for which the plaintiffs were entitled to compensation. **Benson v. State of South Dakota, 710 N.W.2d 131 (S.D. 2006)**.

WATER RIGHTS

JURSIDICTION. The plaintiff and defendant owned fractional shares of water rights in three ditches. The plaintiff filed suit for damages based on allegations that the defendant had used, intentionally and negligently, more water from the ditches than was allowed under the defendant's water rights, causing a loss of water available to the plaintiff. The plaintiff's claims included negligent irrigation, trespass and nuisance based on allegations that the defendant had allowed water to flood the plaintiff's land. The defendant answered that the claims were barred by the doctrine of laches, the statute of limitations, waiver and contributory negligence. The trial court had ruled for the defendant, holding that the defendant had acquired the plaintiff's water right by adverse possession. The appellate court raised the issue of jurisdiction of the trial court and stated that the jurisdiction for issues involving rights to water were exclusive to the Water Court. The appellate court held that the negligent irrigation, trespass and nuisance claims were properly in the jurisdiction of the trial court because the claims did not involve rights to water but primarily the use of the water; therefore, the appellate court upheld the trial court dismissal of those claims for lack of proof of the flooding and any damages. On the adverse possession ruling, however, the appellate court reversed, holding that, because the issue involved the parties' rights to water, exclusive jurisdiction for the case was with the Water Court. **Archuleta v. Gomez, 2006 Colo. App. LEXIS 632 (Colo. Ct. App. 2006)**.

IN THE NEWS

EXPORTS. The European Union has announced that it is dropping plans to reintroduce sanctions on U.S. goods due to a provision in tax H.R. 4297 (signed by the President on May 17, 2006) repealing transitional extraterritorial income exclusion binding contract relief. **IP/06/606 (May 12, 2006)**.

SALES TAX. The Governor of Georgia has signed H.B. 834 into law which provides a two-year (July 1, 2006 - June 30, 2008) sales tax exemption for liquefied petroleum gas or any fuel used in a structure where swine are raised.