[29] 110 T.C. No. 31 (1998).
[30] I.R.C. § 1402(a)(1).
[31] See I.R.C. § 1402(a)(1).
[32] Stevenson v. Comm'r, T.C. Memo. 1989-357.
[33] *Id*.
[34] See 4 Harl, *Agricultural Law* § 37.03[1] (1998).
[35] 110 T.C. No. 31 (1998).
[36] Newberry v. Comm'r, 76 T.C. 441 (1981); Ray v. Comm'r, T.C. Memo. 1996-436.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

FENCE. The property dispute arose from the placement, more than 40 years ago, of a fence too far on to the defendant's property. The plaintiff had maintained the fence for over 30 years and the parties or their predecessors had recognized the fence as the boundary between the two properties. The defendant argued that the doctrine of acquiescence of a fence did not apply because the fence did not fully enclose the disputed property. The evidence demonstrated that a gap existed at the end of the fence when a creek receded during dry months but that the fence reached the water in wet months. The court held that the natural boundary of the creek would be included to determine whether the fence completely enclosed the disputed property and upheld the trial court award of title to the disputed property to the plaintiff. **Lindgren v. Martin, 949 P.2d 1061 (Idaho 1997)**.

ANIMALS

DOGS. The defendant county had ordered the plaintiff's dog to be destroyed under Or. Stat. § 609.155(3)(a) because the dog had chased a horse owned by a third party in the third party's pasture. There was no evidence that the horse was injured or that the dog had attempted to harm the horse. The plaintiff argued that the statute required proof of injury or intent to injure. The court held that the statute was clear that merely chasing livestock was an action that required that the dog be put to death. **Roach v. Jackson County, 949 P.2d 1227 (Or. Ct. App. 1997)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXEMPTIONS

EARNED INCOME TAX CREDIT. The debtors filed for Chapter 7 in December 1995 and claimed their 1995 earned income tax credit as exempt under Okla. Stat. tit. 31, § 1(A)(19) which allowed an exemption for "alimony, support, separate maintenance or child support payments to the extent reasonably necessary for the support of such person and any dependent of such person." The court noted that such payments usually result from a divorce decree but that the statute did not restrict the exemption to divorce decree payments. The court held that the purpose of the earned income tax credit was the support of families with children and allowed the exemption. ***In re* George, 98-2 U.S. Tax Cas. (CCH) ¶ 50,588 (Bankr. N.D. Okla. 1998)**.

HOMESTEAD. The debtor was of advanced age and poor health. Three years before filing for bankruptcy, the debtor moved to a nursing home but had since moved in with a daughter who provided medical care. The debtor's other two daughters lived in the debtor's residence. The debtor argued that the residence still was eligible for the homestead exemption because the debtor's absence from the residence was involuntary, due to poor health and need of care. The court held that the evidence did not demonstrate any necessity that the debtor move out of the residence but only that it was more convenient for the daughter who cared for the debtor. The court also noted that the eligibility for the exemption relied more on physical presence than personal intent and held that the residence was not eligible for the exemption. **Matter of Burns, 218 B.R. 897 (Bankr. N.D. Ind. 1998)**.

The debtor owned a 42 acre property on which the debtor's residence was located. The property was located within city limits and city sewer and water hookups were available to the property but not used. The city provided fire and police protection for the property. The property was surrounded by residential subdivisions and the property was zoned for residential use. The court held that the property was an urban homestead, limited to an exemption of one acre. **Matter of Crowell, 138 F.3d 1031 (5th Cir. 1998)**.

Chapter 12-*ALM* § 13.03[8].*

PLAN INTEREST. This ruling involved two unrelated Chapter 12 cases in which the Bankruptcy Court had set an interest rate on payments on secured claims as equal to the rate for U.S. Treasury instruments of similar duration. The cases were appealed but sent back to the Bankruptcy Court in light of new decisions. During the appeals in these cases, the Second Circuit Court of Appeals decided *In re Valenti, 105 F.3d 55 (2d Cir. 1997),* which held that the basic interest rate should not have any factor for a "coerced loan" aspect of the plan payments. However, *Valenti,* held that the interest rate should be adjusted for a risk of default factor. The issue was further affected by the holding in *Associates Commercial Corp. v. Rash, 117 S. Ct. 1879 (1997),* which held that any risk factor was to be included in the value of the claim before the interest rate was determined. The Bankruptcy Court held that the U.S.

Treasury instruments' interest rate without any adjustments was appropriate in this case because the claim was oversecured. The Supreme Court in *Rash* stated that the "replacement value standard accurately gauges the debtor's use of the property" in cases where the debtor retains the collateral for a secured claim; therefore, no additional compensation was required from an increased interest rate on payments of the claim. ***In re* Goodyear, 218 B.R. 718 (Bankr. D. Vt. 1998)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

NET OPERATING LOSSES. Five months before filing for Chapter 7 in March 1995, the debtor filed the income tax return for 1993 and made the election to carry forward all net operating losses (NOLs) in that year. If the NOLs had been carried back, the debtor would have been entitled to over $200,000 in refunds, far more than if the NOLs were carried forward. The Chapter 7 trustee filed income tax returns for the estate and claimed a refund based on the carry back of the NOLs. When the IRS disallowed the carrybacks, the trustee sought avoidance of the NOL election by the debtor as a fraudulent transfer. The court held that (1) the NOL election was a transfer, (2) NOLs are an interest in property of the debtor, (3) the election was a fraudulent transfer because the debtor did not receive a reasonably equivalent value for the election and the debtor was insolvent at the time of the election. The court also held that the transfer of tax attributes under I.R.C. § 1398 did not restrict the trustee's avoidance powers under Section 548. Therefore, the court held that the NOL election could be avoided by the trustee in favor of allowing the trustee to carry the NOLs back to earlier tax years. ***In re* Feiler, 218 B.R. 957 (Bankr. N.D. Cal. 1998)**.

POST-PETITION INTEREST. The debtor filed for Chapter 7 and had nondischargeable tax claims remaining at the end of the case. The IRS sought interest on the claims from the date of the bankruptcy petition. The court held that post-petition interest on nondischargeable tax claims was also nondischargeable. **In the Matter of Johnson, 98-2 U.S. Tax Cas. (CCH) ¶ 50,552 (5th Cir. 1998)**.

CONTRACTS

AGISTER CONTRACT. The plaintiff had pastured cattle on the defendant's land for several years. After the defendant moved to other property, the parties agreed to allow the plaintiff to continue to pasture the cattle on the defendant's land but the plaintiff hired a third party to care for the cattle while they were on the defendant's land. In one year, 116 cattle became sick from eating vegetation contaminated by chemicals on the defendant's land which were not known by either party to be there. The plaintiff alleged an oral agister's contract and claimed the loss of the cattle was a breach of the contract. The court held that no bailment contract was proved because there was no evidence that the defendant or the defendant's agent accepted possession and control of the cattle. The court held that the caretaker was not shown to be an agent of the defendant and was more likely an agent of the plaintiff. **Hoye v. Like, 958 S.W.2d 234 (Tex. Ct. App. 1997)**.

FEDERAL AGRICULTURAL PROGRAMS

BRUCELLOSIS. The APHIS has adopted as final amendments to the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Alabama from Class A to Class Free. **63 Fed. Reg. 37243 (July 10, 1998)**.

BORROWER'S RIGHTS. The plaintiffs, husband and wife, defaulted on loans from the FmHA, now the FSA, and the FmHA foreclosed on the plaintiffs' farm. The FmHA sent notice to the plaintiffs of their rights to leaseback the residential portion of the property but the plaintiffs refused. The FmHA held the property for several years and then placed the farm for sale, giving the plaintiffs 37 days notice of the sale. The sale was made at auction to a third party and no right of first purchase at the sales price was given to the plaintiffs. The plaintiffs argued that the failure to give them information about exercising their right of first chance to purchase the property at the sale price was a violation of 7 U.S.C. § 1985(e)(1)(C). The FmHA argued that the plaintiffs' rights expired 180 days after the FmHA purchased the property or when the plaintiffs refused to leaseback the residence. The court held that the plaintiffs' right of first purchase was not affected by the leaseback program and that Section 1985(e) required reasonable notice of the right to the plaintiffs before the 180 period began. The court ordered the FSA to reissue notice of the plaintiffs' right and allow the plaintiffs 60 days to obtain sufficient financing to purchase the farm at the sales price. **Velarde v. United States, 992 F. Supp. 1235 (D. Colo. 1998)**.

CROP INSURANCE. FCIC has issued proposed amendments to the Common Crop Insurance Regulations effective for the 1999 and succeeding crop years. The only change to the provisions for insuring guaranteed production plan of fresh market tomatoes is to change the calendar date for the end of the insurance period for certain states. The end of the insurance period for Delaware, Maryland, New Jersey, North Carolina, and Virginia will be changed from September 20 to October 15 of the crop year. The end of the insurance period for Florida, Georgia, and South Carolina will be changed from September 20 to November 10 of the crop year. The FCIC determined that a September 20 ending date created an insurance period that was too short in these states. The FCIC also found that, under the current crop provisions, if the crop is planted during the fall planting period in accordance with the special provisions in effect for the 1999 crop year, the crop will not reach maturity before the end of the insurance period. The proposed change in the dates for the end of the insurance period will allow for insurance coverage from the time of planting until maturity of the crop. **63 Fed. Reg. 38761 (July 20, 1998)**.

The FCIC has announced its approval for reinsurance and subsidy for the insurance of wheat in select states and counties under the Crop Revenue Coverage plan of insurance for the 1999 crop year. The notice informs eligible producers and the private insurance industry of the CRC coverage changes for wheat and provide its terms and conditions. **63 Fed. Reg. 37829 (July 14, 1998)**.

FEDERAL ESTATE AND GIFT TAX

INCOME IN RESPECT OF DECEDENT. The decedent and surviving spouse had created a trust and transferred investment real properties to the trust. The trust was a grantor trust under I.R.C. § 671. After funding the trust, the decedent and spouse, as trustees of the trust, intended to exchange the properties in the trust for like-kind properties in separate exchanges that qualified for nonrecognition treatment under §1031. The decedent and spouse entered into an exchange agreement with a bank and separately sold each of the properties in the trust. At the time of the decedent’s death, the decedent and spouse had identified one replacement property and entered into a contract to purchase the replacement property. However, the second replacement property had not yet been identified at the time of the decedent's death. The exchanges were then completed after the decedent’s death by identifying and acquiring the second replacement property and acquiring the first replacement property. The IRS ruled that, because the exchange of properties qualified under Section 1031, the proceeds from the exchange of the properties attributable to the decedent’s interest in the properties did not constitute a right to receive an item of income in respect of decedent under I.R.C. § 691. In addition, because (1) the decedent was treated as owning a share of the trust property at the time of death, and (2) the exchange qualified for nonrecognition treatment under §1031, the decedent was treated as owning one-half share of the replacement properties 1 and 2 at the time of death. Accordingly, the decedent was entitled to a basis adjustment for the replacement properties under both I.R.C §§ 1014(a), 1014(b)(6). **Ltr. Rul. 9829025, April 17, 1998**.

INSTALLMENT PAYMENT OF ESTATE TAX. The decedent's estate timely filed its estate tax return on December 21, 1978. The estate properly elected under I.R.C. § 6166 to defer the payment of a portion of its estate tax liability attributable to an interest in a closely held business. Under this election, for the first four years following the original due date for the tax, the estate made annual payments of interest only. For the following ten years, it timely made combined annual payments of the tax, plus additional accrued interest. The final installment payment was received by the IRS on December 23, 1993. The estate filed a claim for refund on December 12, 1995, requesting a refund of interest paid between December 1982 and December 1993 as well as other administration expenses from its tax years 1986 through 1996. The estate did not follow the procedure in Rev. Proc. 81-27, 1981-2 C.B. 548 or file a protective claim for refund. Rather, the estate paid the full amount of each installment and did not file any supplemental Forms 706 to claim deductions for interest or other expenses of administration. Nearly two years after the final installment was paid, the estate filed a claim for refund that claimed a deduction for interest and other administration expenses paid throughout the entire ten year installment payment period. The IRS acknowledged that the taxpayer overpaid the estate tax and interest. However, pursuant to the limitation imposed by I.R.C. § 6511(b)(2)(B), the IRS ruled that a refund claim is limited to the amount paid within two years of the date the claim was filed. Accordingly, the IRS refunded only the amount paid in the last installment, which was the amount paid within the two years preceding the claim for refund. **Ltr. Rul. 9828002, March 9, 1998**.

POWER OF APPOINTMENT. The decedent operated an incorporated business but the decedent’s stock was owned by the decedent’s sister-in-law in order to keep the stock from the decedent’s creditors. The stock was transferred to a trust for the benefit of the decedent. The trustee was the decedent’s nephew and the trust had a spendthrift clause preventing the decedent from transferring or assigning any interest in the trust assets. The decedent’s estate sought to treat the stock as part of the decedent’s gross estate in order to increase the basis of the stock to reduce the gain from the post-death sale of the stock. The IRS ruled that the stock was not included in the decedent’s gross estate because the decedent did not have any power of appointment in the stock. The estate argued that the decedent actually disregarded the trust and treated the stock as the decedent’s property. The court held that the trust provisions were clear and unambiguous that the decedent had no right to transfer or assign the stock; therefore, the stock was not included in the decedent’s estate and did not receive an increase in basis at death. **Pitt v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 60,314 (E.D. Mich. 1998)**.

VALUATION. The taxpayer owned land, consisting of five separate adjacent unsurveyed lots. Four of the lots are completely wooded and the taxpayer planed to transfer the fifth lot to a trust. The property was characterized as a single parcel of real property on the tax map and was assessed as a unit for property tax purposes. A three acre portion of the property contained a residential dwelling and a barn which was used for storage. About one-half of the property consisted of "backland" with steep grades unsuitable for development. The property was located in a town, which was characterized as a small bedroom community. The town was zoned only for residential use, and commercial use was permitted only by special variance. The neighborhood in which the property is located is rural in nature, the majority of the landowners in the neighborhood are large landowners, and the properties are used for residential purposes. The taxpayer used the dwelling as a vacation home and never rented any part of the property to anyone. The IRS ruled that the property was a qualified personal residence under I.R.C. § 2702. **Ltr. Rul. 9829026, April 17, 1998.**

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. The taxpayers, husband and wife, had 10 children. The taxpayers filed their income tax return, claiming only regular income and regular tax on that income. The taxpayers had medical expenses in excess of 10 percent of AGI and claimed deductions for state and local taxes and $29,400 in personal exemptions. The IRS assessed a deficiency based on a determination that alternative minimum tax was owed, resulting from the large medical deduction, state and local tax deduction and personal exemptions. The taxpayers had not claimed any tax preference items as a deduction. The taxpayers argued that application of the alternative minimum tax adversely affected large families, contrary to congressional intent. The court held that the statute was clear as to the AMT requirements and the statute was the best indication of congressional intent. **Klaassen v. Comm'r, T.C. Memo. 1998-241**.

BAD DEBTS. The taxpayer was the sole owner of an S corporation and loaned the corporation money which was carried as a loan on the corporation's books. The taxpayer was the chairman of the board but not an employee of the corporation. The taxpayer claimed a business bad debt deduction but the IRS characterized the deduction as a nonbusiness bad debt. The court held that the bad debts were nonbusiness bad debts because the taxpayer failed to show that the loans were made to protect the taxpayer's employment with the corporation. **Kaiser v. Comm'r, T.C. Memo. 1998-264**.

EMPLOYEE MEALS. The IRS ruled that a casino could exclude the cost of meals provided for its employees if the onsite eating facility was reasonably believed to be a de minimis eating facility and at least 90 percent of the meals were either (1) excludible under I.R.C. § 119 or (2) reasonably expected to be excludible under I.R.C. § 119. **Ltr. Rul. 9829001, March 10, 1998**.

HOBBY LOSSES-*ALM* § 4.05[1].* The taxpayers purchased a farm which was enrolled in the Conservation Reserve Program (CRP). The taxpayers had to apply to the USDA to take over the participation in the CRP from the previous owners and the USDA ruled that the taxpayers were actively engaged in the business of farming. The IRS, however, assessed tax deficiencies based on disallowance of deductions for farm expenses because the taxpayers were not engaged in farming for a profit. The taxpayers eventually won their appeal on that issue and sought litigation fees from the IRS because the IRS position was not substantially justified. The taxpayers argued that the USDA finding was binding on the IRS. The court held that the USDA finding was based on different criteria from those used by the IRS. The court noted that the taxpayers had not supplied the IRS with sufficient information to make a full determination early and that factual issues remained through most of the appeal process. **Hasbrouck v. Comm'r, T.C. Memo. 1998-249**.

INCOME. The taxpayer had only wage income but excluded from gross income amounts garnished to repay a delinquent loan. The court held that garnished wages were not excluded from gross income. **Minor v. Comm'r, T.C. Memo. 1998-237**.

IRA. The IRS has announced that **Form 5305-RB,** Roth Individual Retirement Annuity Endorsement, a new model annuity endorsement agreement, has been published. A Roth IRA is established after the contract, which includes Form 5305-RB, is executed by both the annuitant and the issuer. The form meets the requirements of I.R.C. § 408A. The form is available by computer from the IRS internet site (http://www.irs.ustreas.gov). **Ann. 98-58, I.R.B. 1998-28, 12**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

ELECTION. An S corporation merged with another corporation which became a subsidiary of the S corporation by having the shareholders transfer their stock to the new corporation. The new corporation intended to file a QSSS election but discovered that the election could cause the corporations to lose the benefit of suspended losses; therefore, the merger was dissolved with all stock returned to the original owners. The corporation sought application of the contract doctrine of rescission to apply to the tax aspects of the transactions. The IRS ruled that *Rev. Rul. 80-58, 1980-1 C.B. 181* provided the rules for applying the doctrine of rescission and ruled that the doctrine of rescission would be applied to treat the transfer of stock as never happening. **Ltr. Rul. 9829044, April 21, 1998**.

TRUSTS. The taxpayer was an S corporation and had two trusts as shareholders. The income beneficiaries of the trusts made elections under I.R.C. § 1361(d)(2) to treat the trusts as QSSTs. The income beneficiaries reported all pass-through items of income, deduction, and credit allocable to the shares of stock held by the trusts. All of the shareholders, including the QSSTs, entered into an agreement to sell all of their shares of stock to a publicly-traded C corporation. As part of the stock purchase agreement, the shareholders of the two corporations made an election under I.R.C. § 338(h)(10). The S corporation had gain from the deemed sale of the S corporation's assets resulting from the Section 338(h)(10) election. The IRS ruled that the corporate gain from the deemed sale of the S corporation's assets resulting from the Section 338(h)(10) election was recognized by the trusts and not the income beneficiaries of the trusts. **Ltr. Rul. 9828006, April 6, 1998**.

SALE OF RESIDENCE. This case involved tax years prior to the 1997 enactment of the provision excluding gain from the sale of a residence. The taxpayer had filed for bankruptcy and the taxpayer's personal obligation on a residential mortgage was discharged. The taxpayer sold the residence and paid the mortgage. The taxpayer did not purchase a replacement residence. The taxpayer calculated the gain from the sale by excluding the mortgage amount from the proceeds of the sale, arguing that the debt was

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discharged in bankruptcy. The court held that the full proceeds of the sale were included in determining the gain from the sale. **Neighbors v. Comm'r, T.C. Memo. 1998-263**.

PRODUCT LIABILITY

FERTILIZER. The plaintiff was a governmental corporation which owned the World Trade Center and sued in negligence and products liability the defendant fertilizer manufacturer for damages resulting from use of the defendant's products in the bombing of the trade center. The plaintiff argued that the ammonium nitrate produced by the defendant was unreasonably dangerous and defective in that the chemical was not produced in a nonexplosive form available at the time. The court held that the defendant was not liable for the bombing because the actions of the persons who constructed the bomb were an intervening cause of the bombing which were not reasonably foreseeable by the defendant. **Port Authority of N.Y. & N.J. v. Arcadian Corp., 991 F. Supp. 390 (D. N.J. 1997)**.

FRONT LOADER. The plaintiff was injured while using a tractor front loader to move round hay bales. The loader was manufactured by the defendant but was not equipped with an optional bale clamp. The plaintiff used a homemade fork attachment. The plaintiff was injured when a bale fell on the plaintiff when the loader raised up accidentally, allowing the bale to fall back onto the tractor, while the plaintiff was distracted by an obstruction behind the tractor. There was no evidence that the loader controls allowed the loader to rise by itself. The loader carried warnings about the danger of using the loader to move hay bales without the use of the clamp. The evidence also showed that the plaintiff knew about the danger of transporting bales without the clamp and had used similar equipment to move bales with a clamp. The defendant argued that it had no liability because the warnings were adequate for the plaintiff, based on the plaintiff's experience. The court held that summary judgment for the defendant was proper because the plaintiff demonstrated no defect in the loader or the warnings which gave rise to the accident. **Delaney v. Deere & Co., 985 F. Supp. 1009 (D. Kan. 1997)**.

PROPERTY

EASEMENT. The plaintiff had used a road over the defendant's property for many years as the only means of reaching the plaintiff's property from the nearest public highway. The defendant complained that the plaintiff drove too fast on the road and attempted to prevent the plaintiff's use of the road. The plaintiff sought a right to use the road, either as a prescriptive easement or as a private road resulting from strict necessity. The trial court had denied all of the plaintiff's claims. The appellate court agreed that no prescriptive easement could be awarded because the evidence showed that the plaintiff may have received permission to use the road from the current and past owners of the defendant's land. However, the appellate court held that, because the plaintiff had no other means of reaching the plaintiff's property, under Mo. Stat. § 228.342, a private road should have been declared arising out of strict necessity. The court noted that, although the plaintiff had obtained permission to use a neighbor's property to reach the plaintiff's property, the plaintiff did not have an enforceable right to use the neighbor's road. **Spier v. Brewer, 958 S.W.2d 83 (Mo. Ct. App. 1997)**.

TRESPASS. The plaintiff was the owner of a rural property which was subject to an easement along power lines which gave the defendant rural electric cooperative the right to enter the property and cut trees and branches which could strike the power lines. The evidence demonstrated that the defendant cut down over 300 trees, many of which were in no danger of striking the power lines. In addition, the defendant poisoned much of the remaining trees and stumps. The plaintiff sought damages for trespass, arguing that the defendant exceeded the rights granted in the easement. The jury had reached a verdict for the defendant. The appellate court reversed the jury verdict as to the poisoned trees and as to trees which were not in danger of striking the power lines. The court noted testimony of agents of the defendant which admitted that many trees were cut without authorization under the easement. **Murphy v. Fannin County Elec. Co-op., 957 S.W.2d 900 (Tex. Ct. App. 1997)**.

SECURED TRANSACTIONS

STATUTORY LIENS. The debtor had boarded an Arabian horse with a stable. Upon filing for bankruptcy, the debtor sought return of the horse as estate property, but the stable refused to return the horse, claiming a security interest in the horse for unpaid stable fees. Under Iowa Code § 579.1, the stable had a statutory lien against the horse for unpaid stable fees. The debtor argued that the Section 579.1 lien required perfection by filing, because the statute provided that Section 579 was subject to Section 579A (agister liens). The court held that the "subject to" language in Section 579.1 applied only as to the priority of the liens created by the two statutes. Therefore, the court held that the stable fee lien was perfected and that transfer of the horse to the debtor's estate would first require a determination of need for adequate protection. ***In re* Klemme, 218 B.R. 906 (Bankr. N.D. Iowa 1997)**.

CITATION UPDATES

Estate of Rapp v. Comm'r, 140 F.3d 1211 (9th Cir. 1998), *aff'g*, T.C. Memo. 1996-10 (marital deduction) see p. 53 *supra*.

Redlark v. Comm'r, 141 F.3d 936 (9th Cir. 1998), *rev'g*, 106 T.C. 31 (1996) (interest) see p. 62 *supra*.

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