payments derived from sharecropping or share-farming."[14] The Eighth Circuit, not surprisingly, also gave short shrift to the argument that the instructions to Form 4835 (on which non-material participation share rent income and expenses are reported) contradicted the statute and should override I.R.C. § 1402(a)(1).

The appellate court also stated that it could not say that the Tax Court erred in holding that the taxpayer in the three cases had materially participated under the respective arrangements. However, the Eighth Circuit was impressed by another argument, that the lessor-lessee arrangements should stand on their own, apart from any employment relationship, and that if the rentals were "consistent with market rates for agricultural land"[15] the rents were not "derived under an arrangement" and, therefore, self-employment tax was not due.[16] Thus, the Eighth Circuit went beyond the focus up to that time, on the words "under an arrangement" in Section 1402(a)(1), and looked at the phrase "derived under an arrangement" in the statute.

The court remanded the cases to the Tax Court to provide an opportunity for IRS to show a connection between the rents and the "arrangement."

In mid-July, 2002, the Tax Court in a brief opinion, conceded that the rentals in the three cases were fair market rentals.[17]

**Other cases**

Another case appealable to the Eighth Circuit, *Milton v. Commissioner,*[18] involves the leasing of land by a family partnership to a corporation controlled by the same individuals. IRS argued that the partnership rental income was subject to self-employment tax.

A case in New York State, appealable to the Second Circuit Court of Appeals, has been docketed in the Tax Court. That case, *Fowler v. Commissioner*,[19] involved the rental of land containing apple trees to a family-owned corporation. That case indicates that the Internal Revenue Service is positioned to challenge in another circuit the Eighth Circuit Court's analysis in situations involving the rental of land to a family-owned entity as tenant.

**In conclusion**

While the advice to taxpayers potentially subject to challenge to be careful to set rental rates in keeping with rental rates in the area for comparable land is still good counsel, indications that IRS is litigating another case in the Second Circuit Court of Appeals area suggests that the more general solutions to the problem continue to be relevant. Those solutions include¾(1) shifting ownership of rental land to the name of a spouse (who is not involved in the business); (2) conveying the land to another entity (such as an LLC or LP); (3) retiring from the business; or (4) seeking a broader solution through legislative amendment.[20]

**FOOTNOTES**

1 T.C. Memo. 1995-571. See generally 5 Harl, *Agricultural Law* § 37.03[a][i] (2002); Harl, *Agricultural Law Manual* § 4.06[3] (2002). See also Harl, "More on *Mizell*," 12 *Agric. L. Dig.* 9 (2001); Harl, "Renting Land to a Family Entity," 7 *Agric. L. Dig.* 157 (1996); Harl, "Renting Land to a Family Partnership, Corporation or LLC," 7 *Agric. L. Dig.* 49 (1996).

2 Hennen v. Comm'r, T.C. Docket No. 7535-98 (July 10, 2002). The Tax Court opinion has not, as of August 20, 2002, been posted on the Tax Court web site (www.ustaxcourt.gov) or released by the major tax services.

3 T.C. Memo. 1995-571.

4 *Id*.

5 I.R.C. § 1402(a)(1).

6 *Id*.

7 *Id*.

8 Ltr. Rul. 9637004, May 1, 1996.

9 FSA Ltr. Rul. 9917008, Dec. 10, 1998; FSA Ltr. Rul. 9917005, Dec. 10, 1998; FSA Ltr. Rul. 9917006, Dec. 10, 1998.

10 T.C. Memo. 1995-571.

11 T.C. Memo. 1999-256.

12 T.C. Memo. 1999-306.

13 T.C. Memo. 1999-333.

14 236 F.3d 410 (8th Cir. 2000).

15 *Id*.

16 *Id*.

17 See n. 2 *supra*.

18 T.C. Docket No. 13594-01.

19 T.C. Docket No. 013920-01 (Dec. 14, 2001).

20 5 Harl, *Agricultural Law* § 37.03[3][a] (2002).

# CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

## BANKRUPTCY

### GENERAL-*ALM* § 13.03.*

**ESTATE PROPERTY**. The Chapter 7 debtors operated a business which purchased agricultural commodities and was subject to PACA. Several creditors had claims against the PACA trust and filed claims in the bankruptcy case. The bankruptcy trustee filed proceedings to recover preferential transfers made by the debtors for goods and services provided by third parties. The trustee negotiated a settlement for an amount which was paid to the bankruptcy estate. The PACA trust creditors sought to recover the preferential transfer amount as part of the PACA trust. The bankruptcy trustee agreed that the recovered amount was subject to the PACA trust but argued that the amount should be reduced by the costs of the recovery. The bankruptcy trustee proposed paying 83 percent of the recovery amount to the PACA trust.

**Agricultural Law Manual* (ALM).

However, the PACA creditors were not satisfied with the "bird in the hand" and argued that the entire recovery was PACA trust property. The dispute resulted in the PACA trust creditors losing all "the birds in the bush." The court noted that the dispute did not arise if the recovered funds were not PAC trust property; therefore, the court first examined that issue. The court held that a preferential recovery, in itself, was not subject to the PACA trust because it was not an agricultural commodity, was not an inventory of food or other product derived from an agricultural commodity, and was not a receivable or proceeds from the sale of a commodity. Assuming that the preferential transfers were initially funded from the sale of an agricultural commodity, the court held that the recovered funds could not be traced to the sale proceeds because the recovery occurred more than two years after any agricultural commodity sales by the debtors. The court noted that the PACA trust did not extend to the general assets of the preferential creditors unless traceable to the sales of commodities. The court next examined the authority under the bankruptcy law for excluding PACA trust assets from the bankruptcy estate and held that Section 541(d) does not exclude PACA trust assets which become part of the estate through the preferential transfer rules because, at the commencement of the case, the debtors did not have an interest in the preferential transfer property. The preferential transfer property can be recovered only by the bankruptcy trustee and did not arise as estate property until more than one year after the bankruptcy petition. The court held that the recovered preferential transfer property was not subject to the PACA trust and the bankruptcy trustee's proposal was improper. ***In re*** **Churchfield, 277 B.R. 769 (Bankr. E.D. Cal. 2002)**.

**EXEMPTIONS**

TOOLS OF THE TRADE. The debtors, husband and wife, had farmed for almost 20 years before experiencing financial difficulties. The wife and then the husband took off-farm jobs while continuing to farm. The bank first refused to make any additional operating loans and then threatened foreclosure of the farm mortgage. The debtors were able to continue farming by obtaining credit for seed and supplies directly from their suppliers but filed for Chapter 7 during the crop year. The crop was harvested post-petition. The debtors both claimed exemptions for farm machinery as tools of the trade of farming. The creditors objected to the wife's exemption, arguing that the wife did not have an ownership interest in the equipment and neither debtor was a farmer because the farm was being foreclosed upon by the bank and the debtors had more income from nonfarm employment. The court held that the debtors were farmers on the date of the petition because the debtors had planted crops and harvested them post-petition. Although the debtors were likely to lose their land, the debtors had arranged for renting farm land from relatives and third parties. The court also noted that the proceeds of those crops exceeded their wages from off-farm employment. The court also noted that the off-farm income was used to support the farm and was used to pay farm expenses in excess of revenues. The court held that the wife had an ownership interest in the farm equipment because (1) the equipment was purchased with general farm income which she helped to produce; (2) the wife co-signed all loans used to purchase the equipment; and (3) the debtors shared all property as family property. The court noted that the exemption statute, Kan. Stat. § 60-2304(e), did not set a minimum ownership requirement. The creditors also argued that, if the debtors co-owned the farm equipment, they formed a partnership and the equipment was not eligible for the exemption as partnership property. The court held that co-ownership of property by a husband and wife did not form a partnership without other indicia of intent to form a partnership, which were not present here. ***In re*** **Lampe, 278 B.R. Bankr. 10th Cir. 2002)**.

**FEDERAL TAXATION-*ALM* § 13.03[7].***

**DISCHARGE**. The debtors had income for 1996 and claimed that they filed an income tax return for that year but had no proof of the filing. The IRS prepared a substitute return for 1996 and made an assessment of taxes based on that return in 1998. The debtors filed for Chapter 7 in 2001 and sought to have the taxes for 1996 declared dischargeable. The court held that, because the debtors had no proof of filing other than their testimony, the taxes were nondischargeable. ***In re*** **Crump, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,562 (Bankr. N.D. Ohio 2002)**.

**NET OPERATING LOSSES**. The debtor was a corporation which filed two bankruptcy cases, a Chapter 11 case and a Chapter 7 case three years later. In the Chapter 11 case, the Bankruptcy Court approved estate expenses for professional fees. The debtor claimed these expenses as net operating losses, carried back three years and as capitalized expenses. After filing the second Chapter 7 case, the debtor filed an amended return and carried the capitalized costs as net operating losses back 10 years under I.R.C. § 172(f) as a "specified liability loss" resulting from the first bankruptcy case. The debtor argued that the fees were eligible for the special 10 year carryback because the fees arose under the bankruptcy law. The court held that the connection between the bankruptcy law and the fee expenses was too attenuated to qualify as required by law. The court noted that while the fees were authorized by the bankruptcy law, there was no requirement that fees be paid and the amount of the fees was contingent until the bankruptcy court approved them. **Standard Brands Liquidating Creditor Trust v. United States, 2002-2 U.S. Tax Cas. (CCH) ¶ 50,565 (Fed. Cls. 2002)**.

# FEDERAL AGRICULTURAL PROGRAMS

**ADMINISTRATIVE OFFSET.** The plaintiffs were a corporation, family trust and partnership which operated farms. In each case, a government farm program payment to the entity was reduced by an offset of money owed personally by a shareholder, member or partner to the CCC or USDA. Under its interpretation of the regulations, the USDA gave notice of the offset to the individuals but not to the plaintiffs. The plaintiffs argued that the no-notice to non-debtors policy violated their due process rights. The District Court dismissed the case for lack of subject matter jurisdiction because the plaintiffs had not exhausted their administrative appeals, as required by 7 U.S.C. § 6912(e). The court held that the statute did not prohibit judicial review of the USDA action because the exhaustion statute merely reiterated the exhaustion requirement and did not specifically prohibit judicial review until administrative appeals were exhausted. The court also noted that the exhaustion doctrine was not required to be followed where there was a constitutional claim which was "(1) collateral to a substantive claim of entitlement, (2) colorable, and (3) one whose resolution would not serve the purposes of exhaustion." The court held that all three conditions were met: (1) the USDA had no administrative appeal process for facial constitutional claims against a regulatory policy, (2) lack of notice was a colorable due process claim, and (3) exhaustion of the administrative appeal process would be futile because the National Appeals Division had no authority over this kind of claim. The USDA also claimed that the case was moot because it had changed its policy to provide notice to non-debtors, but the court refused to dismiss the case because of some evidence that local USDA offices were not providing notice to non-debtors. **McBride Cotton and Cattle Corp. v. Veneman, 290 F.3d 973 (9th Cir. 2002)**.

**CROP INSURANCE**. The plaintiffs were sugar beet growers who had purchased multi-peril crop insurance from the defendants, various crop insurance companies. The plaintiffs experienced crop losses from a hard frost and filed claims with the defendants but the defendants refused to pay the claims. The plaintiffs sued the defendants in state court for contract damages and for violation of the Minnesota Prevention of Consumer Fraud Act (MPCF Act). The defendants moved the case to federal court and the plaintiffs filed a motion to remand the cases back to state court, arguing that the federal court lacked subject matter jurisdiction. The defendants argued that the federal court had diversity jurisdiction because all of the parties are from different states and the amount in controversy exceeded $75,000. The petitions claimed damages of only $50,000 per plaintiff but the defendants argued that the total damages, when divided equally among the plaintiffs, amounted to more than $75,000 per plaintiff. The court rejected this method of determining the amount in controversy for individual plaintiffs, noting that several plaintiffs had much less than $75,000 in damages. The court also refused to separate the plaintiffs with less than the jurisdictional amount as beyond the authority of the court. However, the court did accept the defendants' claim that the actual damage claims had to be aggregated to include both the contract damages and the damages sought under the MPCF Act. In eight of the 10 plaintiffs' cases, the aggregate of these damages exceeded $75,000; therefore, the court held that it had jurisdiction over these plaintiffs' claims. As to the two remaining plaintiffs, the defendants argued that a federal question was involved because the FICA preempted state court actions. The court held that, although some courts have held that the FICA preempts state actions, the FICA did not preempt actions against nongovernmental entities and individuals. The defendants also argued that a substantial federal question was involved in that the crop insurance system was highly regulated and that these regulations would be involved in the case. The court also rejected this argument and remanded the cases of these two plaintiffs back to state court. The court noted that the actions did not attack the federal crop insurance system or regulations but sought damages for the actions of private companies. **Agre v. Rain & Hail, LLC, 196 F. Supp.2d 905 (D. Minn. 2002)**.

**WAREHOUSES**. The FSA has adopted as final regulations revising the regulations administering the United States Warehouse Act (USWA) to implement the provisions of the Grain Standards and Warehouse Improvement Act of 2000 (the 2000 Act). The regulations update federal warehouse licensing operations, authorize electronic warehouse receipts for all commodities, and authorizes the Secretary of Agriculture to establish regulations for voluntary systems for other electronic documents related to sales and transfers of agricultural products. **67 Fed. Reg. 50777 (Aug. 5, 2002)**.

# FEDERAL ESTATE AND GIFT TAX

**DISCLAIMER.** The decedent's will provided for the residue of the estate to pass in trust to the surviving spouse, with the principal and net income to be distributed for the spouse's support, care and welfare. The remainder of the trust passed to a charitable organization. Within nine months after the decedent's death, the spouse disclaimed in writing all of the interest in the trust as a discretionary distributee of trust principal. The trust was then reformed by a local court to provide for a unitrust amount to the spouse of 6.525 percent of net fair market value of the trust assets valued annually. The remainder still passed to the charitable organization. The IRS ruled that the disclaimer of the interest in the principal was qualified, the value of the spouse's unitrust interest was eligible for the marital deduction, and the reformation of the trust did not prevent a charitable deduction for the value of the charity's remainder interest. **Ltr. Rul. 200232015, May 1, 2002)**.

**ESTATE PROPERTY.** The beneficiaries of the decedent's estate discovered that the decedent's caretakers had misappropriated funds from the decedent while the decedent was alive but incapacitated. The beneficiaries sued the law firm, among others, which handled the decedent's affairs and obtained a settlement for return of the legal fees paid to the firm and for damages resulting from the firm's malpractice. The issue was whether and to what extent the recovery from the law firm was to be included in the decedent's estate as representing the value of the claim at the death of the decedent. The court held that the return of the legal fees was not included in the value of the decedent's estate because the legal services were performed after the decedent's death for the estate. As to the main settlement, the court held that the entire settlement represented the value of the claim but allowed a deduction for the value of the legal fees expended to bring the action and reach the settlement and a deduction for the costs expended by the beneficiaries in discovering the lawyers' malpractice and malfeasance of the caregivers. The court held that no deduction was allowed for a portion of the settlement paid directly to the beneficiaries because that amount would have otherwise passed to the beneficiaries from the estate. **Estate of Glover v. Comm'r, T.C. Memo. 2002-186**.

**VALUATION OF STOCK**. The decedent owned 62.96 percent of the stock in a family corporation which operated a heavy equipment rental company. The value of the decedent's stock as determined by the Tax Court was based on a combination of the value the company assets (65 percent weight) and the earnings of the company (35 percent weight) because the company was in no danger of liquidation. The appellate court held that the correct ratio was 85 percent based on asset value and 15 percent based on earnings value. The appellate court also allowed a discount of 34 percent of any built-in gain in the assets' values. The Tax Court and appellate court allowed a 15 percent discount for lack of marketability and 7.5 percent discount for lack of super-majority control. A super-majority vote was required by the corporate charter to force the liquidation of the company. **Estate of Dunn v. Comm'r, 2002-2 U.S. Tax Cas. (CCH) ¶ 60,446 (5th Cir. 2002), *rev'g and rem'g*, T.C. Memo. 2000-12**.

# FEDERAL INCOME TAXATION

**ALTERNATIVE MINIMUM TAX.** The taxpayer had income from wages and claimed deductions for unreimbursed employee expenses, charitable contributions and state and local taxes. The taxpayer also claimed the personal exemption. The taxpayer did not compute alternative minimum taxable income and paid tax based on the regular income only. The court held that I.R.C. § 55(b)(2) required computation of AMTI which did not allow deductions for unreimbursed employee expenses (under I.R.C. § 67(b)), the personal exemption, and the deduction for state and local taxes. Because the taxpayer's AMTI exceeded the exemption amount, the taxpayer was liable for AMT on the amount that the AMTI exceed the exemption amount. Because the AMT exceeded the regular tax, the taxpayer was liable for the AMT. **Moore v. Comm'r, T.C. Memo. 2002-196**.

**AUTOMOBILE EXPENSES**. The taxpayer operated a music entertainment business which involved a band which performed for a fee. The taxpayer claimed a deduction for expense method depreciation and travel expenses for the van. The deductions were disallowed because the taxpayer failed to provide substantiation of the business use of the van and the business purpose for the expenses and because the van was placed in service in a personal activity in a prior taxable year. **Kay v. Comm'r, T.C. Memo. 2002-197**.

The taxpayer was employed as a nurse. Initially the taxpayer worked at a medical facility in the taxpayer's city of residence. However, the employer assigned the taxpayer to temporary employment at the employer's facilities in other cities, with the promise that the taxpayer would eventually be permanently assigned to the facility in the taxpayer's city of residence. When this promise was not fulfilled, the taxpayer changed to permanent employment in another city. The taxpayer claimed travel expenses for automobile and other travel costs for travel to the temporary work sites and maintained travel logs and other written records of the expenses. The court upheld the taxpayer's deductions for the travel expenses for commuting to the temporary work sites because the taxpayer demonstrated a business purpose, the promise of permanent employment, for the location of the residence and substantiated the expenses with written records. **Daiz v. Comm'r, T.C. Memo. 2002-192**.

**BUSINESS EXPENSES**. The taxpayer operated a music entertainment business which involved a band which performed for a fee. The taxpayer claimed deduction for management fees and for professional convention expenses. The court disallowed the deduction because the taxpayer failed to provide substantiation of the business purpose of the expenses. **Kay v. Comm'r, T.C. Memo. 2002-197**.

The taxpayer operated a real estate sales business as a sole proprietorship and formed a wholly-owned corporation which operated two retail businesses and a real estate development business. The taxpayer's business entered into a management contract with the corporation in exchange for a fee of the greater of $48,000 or 70 percent of the net profit of the real estate sales business. The fee was increased over several years by amending the management contract. The taxpayer performed all the management services provided by the corporation but did not receive any salary or other compensation. The taxpayer reported the fees as deductions on Schedule C on the taxpayer's individual tax returns and included the fees in income on the corporation's tax returns. The court held that the existence of the corporation could be ignored because the taxpayer performed all the services and controlled the arrangements that established the management contract and fee. The evidence demonstrated that the taxpayer did not perform the services as an employee of the corporation; therefore, the management contract was ignored and the payment of the management fee was not deductible as an ordinary and necessary business expense. **Stewart v. Comm'r, T.C. Memo. 2002-199**.

**CAPITAL GAINS.** The IRS has announced that the election under § 311(e) of the Taxpayer Relief Act of 1997 (TRA 97), (as amended by § 314(c) of Pub. L. 106-554 and § 414 of Pub. L. 107-147), to treat certain assets held on January 1, 2001, as having been sold and then reacquired on that date is properly made by following the instructions for Form 4797, Sales of Business Property, or Schedule D, Capital Gains and Losses, for Form 1040, 1120, 1120S, 1065, or 1041. Under appropriate circumstances, the IRS will grant requests to make a late election under § 311(e) of TRA 97 and this notice under Treas. Reg. §§ 301.9100-1 through 301.9100-3. See Harl, "'Deemed Sales' of Capital and Section 1231(B) Assets," 13 Agric. L. Dig. 113 (2002). **Notice 2002-58, I.R.B. 2002-__**.

**CASUALTY LOSS**. The taxpayer's residence was damaged by a rain and wind storm. The taxpayer received insurance proceeds and hired a contractor to replace rotten decking and to install a new roof. The taxpayer claimed a casualty loss deduction based on the loss of fair market value of the residence after the storm. However, the taxpayer failed to present evidence of the fair market value of the residence before and after the storm; therefore, the court denied the casualty loss deduction. The taxpayer also sought to justify the loss on the basis of the cost of repair but also failed to substantiate sufficient costs above the 10 percent of gross income limitation. **Kay v. Comm'r, T.C. Memo. 2002-197**.

**DEPENDENTS**. The taxpayer was divorced from the mother of the taxpayer's children, with the mother receiving custodial rights and entitled to child support payments. The children lived with the mother for more than one-half of the tax year. The mother did not sign a statement, either written or on Form 8332, that she did claim the children as dependents for federal income tax purposes. The court held that the taxpayer could not claim the dependency exemption for the children and the earned income tax credit. In addition, the court held that the taxpayer could not use the head of household filing status. **Anderson v. Comm'r, T.C. Summary Op. 2002-103**.

**DISASTER PAYMENTS**. On July 11, 2002, the President determined that certain areas in the Federated States of Micronesia are eligible for assistance from the federal government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of Tropical Storm Chata'an, which included flooding, mudslides and landslides, that began on July 2, 2002. **FEMA-1427-DR**. Accordingly, taxpayers who sustained losses attributable to the disaster may deduct them on their 2001 federal income tax returns.

**DISCHARGE OF INDEBTEDNESS**. The taxpayer had a credit card account and had written to the credit card company to verify the balance on the account. The taxpayer then made a cash withdrawal on that account and made several minimal payments on the account. The taxpayer and credit card company disputed several late charges and the interest rate over several months. The credit card company eventually offered a substantially reduced amount to settle the account, which the taxpayer paid. The credit card company issued a From 1099-C and listed the reduction amount, over $19,000, as discharge of indebtedness income to the taxpayer. The credit card company based the amount on the balance shown on their records as of the settlement date less the settlement amount paid by the taxpayer. The taxpayer argued that the account reduction was not discharge of indebtedness but a determination of the true balance of the account reached by negotiation of a disputed claim. The court held that the taxpayer had discharge of indebtedness income in the amount of the verified balance plus the cash withdrawal less the amount of monthly payments made and the final settlement amount. **Earnshaw v. Comm'r, T.C. Memo. 2002-191**.

**HOBBY LOSSES**. The taxpayer was a physician who also operated a horse breeding operation in conjunction with an S corporation, owned in part by the taxpayer, which owned a farm on which the horses were boarded and trained. The taxpayer developed a business plan for the breeding operation which identified advisors, projected income and expenses, and included a list of assets with expected appreciation and an economic analysis of the horse breeding industry produced by a university. The plan was later amended to change the focus from breeding to racing. The taxpayer was a licensed horse trainer and a certified horse appraiser. The taxpayer published articles on various aspects of horse breeding and racing. The operation, however, produced only losses for its 18 year existence. The court held that the horse breeding/racing operation was not operated for profit because (1) the taxpayer failed to demonstrate that separate and accurate records were maintained which were sufficient to analyze the efficiency and profitability of the operation; (2) the operation produced only losses; (3) the taxpayer had substantial personal income which was offset by the losses; (4) the taxpayer failed to provide evidence that any of the business assets would appreciate in value to offset the losses; and (5) although the taxpayer was either knowledgeable about horse breeding or sought expert advice, the taxpayer failed to provide evidence that the taxpayer had any expertise or sought advice as to how to make the operation profitable. In its discussion of these factors, a major concern of the court was the taxpayer's failure to provide evidence other than the taxpayer's own assertions as to the intent to operate the horse breeding as a profitable business. The case demonstrates a growing emphasis on the need of other-income taxpayers with several years of farm losses to demonstrate that they have made substantial efforts to restructure the farm business to make it profitable within a reasonable period of time. The court here made an observation that if the taxpayer did not have substantial income from a medical career, the taxpayer would not, or even could not, have allowed the losses to continue. **Kuberski v. Comm'r, T.C. Memo. 2002-200**.

**LOSSES**. The taxpayers, husband and wife, initially operated their construction business as a sole proprietorship and then incorporated the business as a C corporation. The corporation terminated in 1991 and the business was terminated. The corporation did not file income tax returns because the corporation never had a profit. The taxpayers claimed a Schedule C loss on their individual Form 1040 tax return for 1995 but did not file a Schedule C. the taxpayers claimed that the loss resulted from an uncollectible judgment awarded to the corporation in 1991. However, the taxpayers presented no explanation as to why the corporation's loss could be passed on to them. The taxpayers merely argued that they had contributed capital to the corporation and should be entitled to the loss. The primary evidence was a check register which did not list the bank or bank account involved and which listed the checks out of numerical order. The court held that the taxpayers were not entitled to a loss deduction because the taxpayers failed to provide any evidence that they suffered a loss. **Portaluppi v. Comm'r, T.C. Summary Op. 2002-106.**.

**PENSION PLANS**. For plans beginning in August 2002, the weighted average is 5.65 percent with the permissible range of 5.09 to 6.22 percent (90 to 120 percent permissible range) and 5.09 to 6.78 percent (90 to 110 percent permissible range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 2002-57, I.R.B. 2002-33**.

**RETURNS**. The IRS has posted the following publications on its web site at www.irs.gov, in the "Forms & Pubs" section: Publication 3402 (Rev. 7-2002), Tax Issues for Limited Liability Companies; Form W-2 (Rev. February 2002), Wage and Tax Statement; and Publication 505 (Rev. December 2001), Tax Withholding and Estimated Tax. These documents are also available at no charge and can be obtained (1) by calling the IRS's toll-free telephone number, 1-800-TAX-FORM (1-800-829-3676); (2) through FedWorld on the Internet; or (3) by directly accessing the Internal Revenue Information Services bulletin board at (703) 321-8020.

The IRS has announced changes in the filing locations for some taxpayers for 2002 paper returns. The IRS has issued an advance list for tax return preparers; the new addresses will be included with the tax return packets sent to taxpayers. **IR-2002-92**.

The IRS has adopted as final regulations that allow income tax return preparers to elect an identifying number as an alternative to their social security number for purposes of identifying themselves on returns they prepare. The regulations do not specify any standards as to the alternative number but do require individuals who employ other tax return preparers to use the individual's employer identification number. **67 Fed. Reg. 52862 (Aug. 14, 2002)**.

# PRODUCT LIABILITY

**ANIMAL FEED.** The plaintiff owned a horse breeding operation and purchased feed from the defendant. The plaintiff's horses became sick and an autopsy on one horse indicated that the ingestion of rat poison was a cause of death. The plaintiff claimed that the feed sold by the defendant was contaminated with rat poison and sued for negligence, breach of implied warranty, strict liability, and violation of the Virginia Commercial Feed Law and Pesticide Control Act. The defendant argued that neither law provided for a right of private action to enforce those laws and that the other claims were preempted by FIFRA. The court held that the state laws did not provide for a right of private action and dismissed those claims. The court also held that the negligence, breach of implied warranty and strict liability claims were not preempted by FIFRA because they were not based on any defect of the label. **Southern States Coop., Inc. v. I.S.P. Co., 198 F. Supp.2d 807 (N.D. W.Va. 2002)**.

# ZONING

**HOG CONFINEMENT FACILITY.** The plaintiff applied for a conditional use permit to construct two hog confinement facilities for over 6,000 pigs. The county board of commissioners denied the permit because (1) the facilities would impact the local roads, create pollution and create undue risk of offensive odors; (2) the manure spreading contracts did not accurately identify the land to be used; (3) the state and county did not have sufficient resources to monitor the facilities; and (4) the permit would not promote the public health, safety and welfare. The trial court upheld the board's decision and granted the board a directed verdict, adding a holding that the plaintiff had failed to provide evidence of attempts to minimize offensive odors. The plaintiff argued that the performance standards set forth in the county ordinance were the sole criteria in determining whether a permit should be granted. The board had considered other factors and the court held that the permit approval consideration should involve all relevant factors and not just the criteria in the performance standards set forth in the ordinance. However, the court held that factor (3) above was not a proper consideration for the permit since it was beyond the control of the plaintiff. The court also held that factor (1) was not proper if the harm caused to the roads could be mitigated by conditions attached to the permit. The court held that, because factor (1) was not fully explored as to mitigating conditions and factor (2) was improperly considered, a direct verdict was improper. The court held that the directed verdict was also improper because the plaintiff had presented evidence of how the plaintiff planned to minimize odors and pollution from the facilities, raising a fact issue as to whether these efforts were sufficient to grant the permit. The court remanded the case back to the board for determinations in accord with these holdings. *In re Conditional Use Permit Denied to Meier, 613 N.W.2d 523 (S.D. 2000)*. After the remand the trial court held an evidentiary hearing and ruled that the denial of the permit was proper because the facility would produce intense offensive odors. The appellate court affirmed the trial court's ruling as based on substantial evidence and not arbitrary or capricious. ***In re* Conditional Use Permit Denied to Meier, 645 N.W.2d 583 (S.D. 2002)**.

# CITATION UPDATES

**Walshire v. United States, 288 F.3d 342 (8th Cir. 2002)** (disclaimers) see p. 89 *supra*.

# IN THE NEWS

**GIFTS.** An appeal has been filed in Hackl v. Comm'r, 118 T.C. 279 (2002). See Harl & McEowen, "Gifts of Future Interests," 13 *Agric. L. Dig*. 105 (2002).

AGRICULTURAL LAW PRESS
P.O. Box 50703 Eugene, OR 97405

# AGRICULTURAL TAX AND LAW SEMINARS

**by Neil E. Harl and Roger A. McEowen**

## September 24-27, 2002 Interstate Holiday Inn, Grand Island, NE

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 seminar are held on Tuesday, Wednesday, Thursday, and Friday. Registrants may attend one, two, three or all four days, with separate pricing for each combination. On Tuesday, Dr. Harl will speak about farm and ranch income tax. On Wednesday, Dr. Harl will cover farm and ranch estate planning. On Thursday, Roger McEowen will cover farm and ranch business planning. **NEW THIS YEAR**: On Friday, Roger McEowen will cover agricultural contracts. Your registration fee includes comprehensive annotated seminar materials for the days attended which will be updated just prior to the seminar. The seminar materials will also be available on CD-ROM for a small additional charge.

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.

Registration brochures were mailed in June and July. However, 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**

## October 17-18, 2002 Spa Resort, Palm Springs, CA

### "Farm & Ranch Income Tax" and "Farm & Ranch Estate and Business Planning."

The seminars are held on Thursday, and Friday. Registrants may attend one or both days, with separate pricing for each combination. On Thursday, Dr. Harl will speak about farm and ranch income tax. On Friday, Roger McEowen will cover farm and ranch estate and business planning. 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 multiple registrations from one firm) are $185 (one day), $360 (two days). The registration fees for nonsubscribers are $200 and $390 respectively.

Registration brochures will be mailed in August. However, 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**

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

# SUBSCRIPTION RATE INCREASE

The recent increase in postage rates and increased printing costs over the years have finally forced us to increase the annual subscription rate for the print version of the *Agricultural Law Digest* to $110 per year. This is the first price increase for the *Digest* since it began in 1989. The new rates will take effect with the next billing date after July 1, 2002 for each subscriber. Each billing offers subscribers the option to subscribe to our e-mail version of the *Digest* which remains at $90 per year and which is e-mailed on the Monday before the print version is published. You can beat the rush and change your subscription now to the e-mail version and we will credit your account with an additional issue for each three print issues remaining on your subscription. Send an e-mail to robert@agrilawpress.com for a free sample or to order the change in subscription.

Printed on recycled paper using soy ink.