CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

DISCHARGE. The debtor had purchased several horses from an acquaintance who sold the right to payment to a creditor. The creditor had the debtor sign security agreements and financing statements and the loan agreement required the debtor to maintain an inventory of horses equal to at least $7,000. Although the debtor provided an inventory of horses, the debtor only owned one horse at the time of the execution of the loan agreement and security interest. The debtor claimed to have sold the remaining horses in order to obtain funds to continue the debtor's horse training and shoeing business. The creditor sought to have the debtor denied a discharge in the Chapter 7 case under Section 727(a)(2) for selling the collateral horses with intent to defraud the creditor. The court held that a discharge was not denied under Section 727(a)(2) because the sale of the horses occurred more than one year before the bankruptcy filing and the creditor failed to demonstrate that the debtor had sold the horses with the intent to defraud the creditor. The court noted that the proceeds of the horse sales were used in the debtor's business. The creditor also argued that the discharge should be denied under Section 727(a)(5) for the debtor's failure to explain the loss of collateral. The court held that the discharge should not be denied under Section 727(a)(5) because the debtor satisfactorily explained the sale of the horses and the use of the proceeds in the business. The creditor argued that the loan was nondischargeable under Section 523(a)(2) because the debtor misrepresented the debtor's inventory at the time of the loan. Although the court acknowledged that the debtor did falsely indicate that the debtor could comply with the inventory requirements of the loan agreement, the court held that the creditor failed to prove that the debtor deliberately made a false representation about the inventory with the intent to deceiving the creditor. **In re Glatt, 315 B.R. 511 (D. N.D. 2004)**.

FEDERAL TAXATION

ADMINISTRATIVE EXPENSES. The debtors originally filed for Chapter 11 and continued the operation of their nursing home business during the bankruptcy case. The business incurred FICA and FUTA taxes during the bankruptcy case and the IRS filed for payment of the taxes as an administrative claim. The debtors then filed a motion to convert the case to Chapter 13 because the debtors no longer operated a business and sought a ruling that the taxes were no longer an administrative claim but were to be treated as a pre-petition tax claim, entitled to eighth priority. The court held that the taxes retained their administrative claim status after the conversion. ***In re* Fowler, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,152 (9th Cir. 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

HONEY. The CCC has adopted as final regulations amending the regulation governing the Honey Nonrecourse Marketing Assistance Loan (MAL) and Loan Deficiency Payment (LDP) Programs of the CCC. The final regulations allow honey pledged as collateral for securing an MAL or to be eligible for an LDP to be stored in CCC-approved, five-gallon plastic storage containers, in addition to the plastic intermediate bulk containers already allowed, metal containers, and steel containers. **70 Fed. Reg. 3139 (Jan. 21, 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

DISCLAIMER. The taxpayer and spouse had created a joint brokerage account. At the death of the spouse, the taxpayer was required to change the account to the taxpayer's name in order to comply with account regulations. During the eight months after the spouse's death, the taxpayer directed the sale and purchase of stock and made cash withdrawals. Within nine months after the death of the spouse, on the advice of an attorney, the taxpayer filed a written disclaimer of the spouse's interest in the account less the amount of earnings accrued after the spouse's death that the taxpayer had accepted benefits. The IRS ruled that the mere change of the name on the account was not deemed an acceptance of the benefits of the entire account; therefore, the disclaimer was effective for estate tax purposes. **Ltr. Rul. 200503024, Oct. 5, 2004**.

MARITAL DEDUCTION. The decedent's will provided for passing of estate property to the surviving spouse in trust for life. The trust made the surviving spouse the trustee and provided for the decedent's children to be successor trustees. The trust also provided for distribution of "all of the net income from the trust estate as the trustee, in the trustee's reasonable discretion, shall determine to be proper for the health, education, or support, maintenance, comfort and welfare of grantor's surviving spouse in accordance with the surviving spouse's accustomed manner of living." The court held that this language did not meet the all income requirement for qualification of the trust for the marital deduction because, under the language, less than all the income could be distributed. In addition, the surviving spouse's position as trustee did no insure distribution of all trust income to the surviving spouse because someone other than the surviving spouse could be a trustee. See Harl, "Handling Taxation of Settlements and Court Judgments," *supra* p. 9. **Estate of Davis v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 60,497 (9th Cir. 2005), *aff'g*, T.C. Memo. 2003-55**.

FEDERAL INCOME TAXATION

CORPORATIONS

CONSTRUCTIVE OWNERSHIP. A family corporation was owned primarily by two brothers, with one initially owning 68 percent of the stock and the other owning 26 percent of the stock. The remaining stock was owned by spouses and children of the brothers. In 1996, the corporation executed an I.R.C. § 368(a)(1)(D), "type D," reorganization and the first brother's share dropped from 68 to 19 percent and the second brother's share increased to 65 percent. In 1998, the first brother purchased the shares of the second brother so that the first brother owned 85 percent of the corporation. On its 1998 income tax return, the corporation claimed a net operating loss deduction for both regular and alternative minimum tax purposes. The IRS adjusted the NOL under I.R.C. § 382(a) which limits the amount of "pre-change" losses which may be claimed after a corporation has a change in ownership that effects a change of more than 50 percentage points in the ownership of a shareholder. The Section 382(a) limitation was applied because the first brother's share of the corporation's stock changed from 19 percent to 85 after the purchase of the second brother's stock. The corporation argued that the two brothers were treated as one shareholder under the constructive ownership rules of I.R.C. § 318 because the brothers shared the same parents and grandparents. The IRS argued that the link by the parents and grandparents did not apply because the parents and grandparents were all deceased. Initially, the court held that the statute allowed for the interpretations argued by both parties. After examining the legislative history and IRS regulations, the court held that the constructive ownership rule looked primarily at the shareholders and their link of ownership through a living shareholder. The court held that, because there was no living parent or grandparent shareholder, the two brothers were not related sufficiently to include the ownership share of one brother as the ownership share of the other brother. Therefore, because the one brother's individual ownership share changed from 19 to 84 percent, the net operating loss deduction limitation of I.R.C. § 382(a) applied to the corporation. **Garber Industries holding Co., Inc. v. Comm'r, 124 T.C. 1 (2005)**.

COURT AWARDS AND SETTLEMENTS. This case consolidated appeals from a Ninth Circuit and Sixth Circuit Court of Appeals case. In the Ninth Circuit case, the taxpayer had been employed as a loan officer in a bank but was forced to leave when the taxpayer refused to divulge confidential information about clients. The taxpayer sued the bank for intentional interference with contract and economic expectations for wrongful discharge from employment. The parties eventually reached a settlement which included punitive damages and payment directly to the taxpayer's attorneys. The taxpayer argued that the compensatory damages, the portion of the settlement paid to the attorneys and the punitive damages were excludible from income. The Tax Court acknowledged that the taxpayer's lawsuit was based on tort but held that the settlement proceeds and punitive damages were included in income because the tort was not based on personal injuries. Although acknowledging a split of authority on the issue, the Tax Court also held that the settlement proceeds paid directly to the taxpayer's attorney were included in income. The Ninth Circuit affirmed on the issue of the settlement proceeds paid to the taxpayer but reversed on the issue of the taxability of the attorneys' fee portion of the settlement, holding that, under Oregon law, the attorney's had sufficient property rights in the fees to remove them from the taxpayer's taxable income. *Banaitis v. Comm'r, 340 F.3d 1074 (9th Cir. 2003), aff'g in part and rev'g in part, T.C. Memo. 2002-5.* In the Sixth Circuit case, the taxpayer sued a former employer for race discrimination in termination of employment. The suit asked only for back pay and attorneys' fees as damages. The parties reached a settlement which characterized the payments as for personal injury to the taxpayer. The Tax Court held that the character of the settlement proceeds was determined by the pending claims made in the lawsuit; therefore, the settlement proceeds were for back pay and attorneys' fees and were included in the taxpayer's income. The Sixth Circuit affirmed on the issue of whether the settlement proceeds were included in the taxpayer's income but reversed on the issue of the attorneys' fees, which were excluded from income because the contingency fee agreement removed the fees from the taxpayer's control. *Banks v. Comm'r, 345 F.3d 373 (6th Cir. 2003), aff'g in part and rev'g in part, T.C. Memo. 2001-48.* The U.S. Supreme Court held that attorney contingent fees were included in both taxpayer's income under the assignment of income doctrine. Note that, under the American Jobs Creation Act of 2004, Pub. L. No. 108-357, for fees and costs paid after October 22, 2004, with respect to a judgment or settlement occurring after that date, a deduction is allowed for attorneys fees and other costs associated with actions involving discrimination in employment or enforcement of civil rights. *AJCA 2004, Sec. 703, amending I.R.C. § 62(a)(19).* **Banaitis v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,155 (Sup. Ct. 2005), *rev'g*, 340 F.3d 1074 (9th Cir. 2003), *aff'g in part and rev'g in part*, T.C. Memo. 2002-5; Banks. v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,155 (Sup. Ct. 2005), *rev'g*, 345 F.3d 373 (6th Cir.**

2003), *aff'g in part and rev'g in part*, T.C. Memo. 2001-48.

The taxpayers had originally included in taxable income an award from an employment discrimination lawsuit. The taxpayer later filed amended returns excluding the award from taxable income and claiming a refund. In a Chief Counsel Advice letter, the IRS ruled that the amended return was not "frivolous," although it was incorrect, and was not subject to a frivolous return penalty under I.R.C. § 6702(a). **CCA Ltr. Rul. 200502042, July 27, 2004**.

DEPRECIATION. An airplane was sold by the manufacturer to a third party which did not take possession of the plane before it was reacquired by the manufacturer. The taxpayer purchased the airplane through a disregarded, for tax purposes, partnership owned by the taxpayer. During the time between the date the plane was reacquired by the manufacturer and the date the plane was purchased by the taxpayer, the plane was used for demonstrations, loaned out for customers' use while awaiting delivery of other planes and flown for testing purposes. Thus, the plane had many hours of use before the purchase by the taxpayer; however, the hours were less than 2 percent of the expected life of the plane. The IRS ruled that the pre-purchase use of the plane did not disqualify the plane for first time use for purposes of the first year additional depreciation under I.R.C. § 168(k)(4). **Ltr. Rul. 200502004, Sept. 30, 2004**.

DISASTER LOSSES. On January 11, 2005, the President determined that certain areas in Indiana were eligible for assistance under the Disaster Relief and Emergency Assistance Act (42 USC 5121) as a result of a snow, which began on December 21, 2004. **FEMA-3197-EM**. On January 11, 2005, the President determined that certain areas in Ohio were eligible for assistance under the Act as a result of record snow, which began on December 22, 2004. **FEMA-3198-EM**. Accordingly, taxpayers in the affected areas who sustained losses may deduct them on their 2003 federal income tax returns.

DOMESTIC PRODUCTION DEDUCTION. The American Jobs Creation Act of 2004 (Pub. L. No. 108-357), added I.R.C. § 199 which provides taxpayer-employers with a deduction equal to the lesser of a phased-in percentage of taxable income or qualified production activities income. In the case of an individual, the deduction is equal to the applicable percentage of adjusted gross income. The IRS has issued guidelines for calculating the deduction. The Digest will publish an article on the new guidelines by Dr. Neil Harl in a future issue. **Notice 2005-14, I.R.B. 2005-5**.

EARNED INCOME CREDIT. The IRS has added to its web site an "EITC Assistant" which can assist taxpayers in determining eligibility for and the amount of earned income tax credit. The new assistant can be found at www.irs.ustreas.gov/individuals/article/0,,id=130102,00.html **IR-2005-11**.

IRA. The taxpayer owned an IRA and was receiving annual distributions under I.R.C. § 72(t)(2)(A)(iv). In one tax year, the taxpayer had received only a portion of the scheduled distribution and the taxpayer submitted a request for the remainder of the required distribution. The IRA custodian failed to make the requested distribution until the following tax year. The IRS ruled that the late distribution would not be considered a modification of the payment schedule or an excessive distribution in the second tax year. **Ltr. Rul. 200503036, Oct. 25, 2004**.

The taxpayer had rolled over a distribution from a pension fund to an IRA without income tax recognition. The taxpayer later withdrew the entire IRA fund, including earnings, and claimed the distribution as taxable income. The taxpayer filed a claim for refund, arguing that the original rollover amount was not taxable upon distribution from the IRA because it established a cost basis in the IRA fund equal to the amount of the rollover. The court held that the rollover of the funds from the pension account to the IRA did not change the tax nature of the funds which continued to be subject to the rules of distributions from pension funds or IRAs. **Sternberg v. Comm'r, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,147 (2d Cir. 2005), *aff'g unpub. op.*, 2004-1 U.S. Tax Cas. (CCH) ¶ 50,202 (E.D. N.Y. 2002)**.

MEDICAL SAVINGS ACCOUNTS. The IRS has announced that the Archer Medical Savings Accounts pilot project was not ended, under I.R.C. § 220(j)(2), in 2004 because less than 750,000 individuals have established the accounts so far. The Archer pilot MSA program is scheduled to end in 2005. **Ann. 2005-12, I.R.B. 2005-5**.

PARTNERSHIPS

MERGERS. The IRS had issued Rev. Rul. 2004-43, I.R.B. 2004-18, 842 which provided rules for recognition of gain or loss created in an assets-over merger. In response to comments that the ruling was contrary to existing regulations, the IRS has announced that Rev. Rul. 2004-43 is revoked and new regulations will be issued which provide the rules included in the ruling. **Notice 2005-15, I.R.B. 2005-5; Rev. Rul. 2005-10, I.R.B. 2005-5**.

PENSION PLANS. The IRS has added a new code (Code Z —Income under I.R.C. § 409A on a nonqualified deferred compensation plan), for use in box 12 on the 2005 Form W-2, and Instructions for Forms W-2 and W-3. Employers must use code Z in box 12 of Form W-2 to report the income shown in box 1 that relates to the recognition of income due to participation in a nonqualified deferred compensation plan that fails to meet the requirements of I.R.C. § 409A. Income recognized under I.R.C. § 409A for nonemployees should be reported both in box 7 and box 15b of Form 1099-MISC. **Ann. 2005-5, I.R.B. 2005-4**.

SAFE HARBOR INTEREST RATES
February 2005

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	2.92	2.90	2.89	2.88
110 percent AFR	3.22	3.29	3.18	3.17
120 percent AFR	3.51	3.48	3.46	3.46
		Mid-term		
AFR	3.83	3.79	3.77	3.76
110 percent AFR	4.21	4.17	4.15	4.13
120 percent AFR	4.60	4.55	4.52	4.51
		Long-term		
AFR	4.72	4.67	4.64	4.63
110 percent AFR	5.21	5.14	5.11	5.09
120 percent AFR	5.68	5.60	5.56	5.54

Rev. Rul. 2005-8, I.R.B. 2005-6.

NEGLIGENCE

RECREATIONAL USE. The plaintiff was a two year old child who accompanied parents to a county fair organized and operated by the defendant. While at the fair, the plaintiff spent much of the time in a backpack carried by the parent. However, when the parent visited the lawn tractor displays, the plaintiff was allowed to climb on to the tractors. The parent was an employee of a manufacturer of lawn tractors and was visiting the fair, in part, to see what products were being offered by competitors. After visiting the tractors, the plaintiff had an ice cream cone, although the parent wiped the child's hands before the child ate the ice cream cone. The plaintiff suffered E. coli poisoning and was hospitalized. The plaintiff, through, the parent, sued the defendant for failure to control the animal waste at the fair, which the plaintiff claimed was carried to the lawn tractors by employees and other fair attendees from the animal barns. The defendant pled immunity from the suit under the Wisconsin Recreational Use statute, Wis. Stat. § 895.52. The plaintiff argued that the recreational use statute did not apply because the injury was caused from the condition of the lawn equipment and not a condition of the land. The plaintiff argued that the term "property" in the statute referred only to the real property and not to movable property such as the lawn tractors. The court held that the recreational use statute did apply to the cause of action because the focus of the negligence claim was on the defendant's improper control of animal waste on the property and not the negligent handling of the lawn tractors. The plaintiff also argued that the recreational use statute did not apply because the parent's main purpose in visiting the fair was not recreational but was related to the parent's business. The court reviewed past cases where plaintiffs had recreational and nonrecreational purposes for being on the property and noted that where a recreational use was made of the property, even though the main purpose was nonrecreational, the recreation use statute applied to injuries sustained during the recreational use. The court held that, because the plaintiff child made use of the recreational aspects of the county fair, the injuries suffered were excepted from liability of the defendant by the recreational use statute. The court went so far as to state "As long as one of the purposes for engaging in the activity is recreation, as it concededly was here, the statute attaches and bars their claim." **Kautz v. Ozaukee County Agricultural Society, 688 N.W.2d 771 (Wis. Ct. App. 2004)**.

ECONOMIC LOSS DOCTRINE. The plaintiff chicken egg farmer hired the defendant to upgrade the ventilation system in one of the chicken barns so that all existing fans were tied to a central control system which would automatically control the air quality in the barn. The defendant installed a central control unit purchased by the plaintiff from a third party. The central control unit failed, resulting in the loss of 18,000 chickens. The plaintiff sued the defendant for negligent performance of the wiring services because the evidence showed that the central control unit was not properly installed in that the backup control was not connected to the power circuits. The jury returned a verdict for the plaintiff and the defendant appealed. The defendant argued that the action was barred by the economic loss doctrine in that the defendant had provided only a product, the ventilation system, and not a service. The court held that the contract was primarily for the services of the defendant in that the main item installed, the central control unit, was supplied by the plaintiff from a third party manufacturer. Although the defendant claimed to have provided additional parts for the system, the defendant did not provide any evidence to identify the additional parts. The court discussed the split authority outside of Wisconsin on the issue of whether the economic loss doctrine, limiting damages to the value of the contracted for services or product, should apply to contracts for services provided to commercial parties. The court declined to extend the doctrine to contracts for services because such contracts do not have the same remedies under the Uniform Commercial Code as do product contracts. Therefore, the court held that the plaintiff's action in negligence was not barred by the economic loss doctrine. **Insurance Co. of North America v. Cease Electric, Inc., 688 N.W.2d 462 (Wis. 2004), *aff'g*, 674 N.W.2d 886 (Wis. Ct. App. 2003)**.

NUISANCE

COMPOST. The main lawsuit involved nuisance and negligence actions filed by neighboring land owners against a county landfill operation for hazardous substances and odors released from the landfill. The defendant mushroom grower was added as a third-party defendant because the waste material from the mushroom operations contributed to the odors released from the landfill operation. The defendant had operated the mushroom farm in the area since 1967 when the area was entirely rural. At the time of the lawsuit, a significant residential population surrounded the farm and landfill. Although the mushrooms were always grown indoors, the compost used to grow the mushrooms was initially produced outside but was moved to an indoor facility in order to control odors from the compost activity. The defendant argued that a nuisance action could not be brought against the defendant because the action was barred by the Washington right-to-farm statute, Rev. Code Wash. §§ 7.48.300 - .310, .905. Under the right-to-farm statute, a farm is exempt from nuisance actions unless (1) the agricultural activity has a substantial adverse effect on public health and safety; (2) the activity is inconsistent with good agricultural practices, laws, and rules; or (3) the activity was not established prior to surrounding nonagricultural activities. The plaintiffs argued that the indoor compost facility was not an agricultural activity covered by the statute and the change to the indoor facility was a "new or radically expanded activity" excepted from the act by the third exception. The court found that the plaintiff's first argument focused solely on the production of the compost and was based on the holding in *Donovan v. Frezzo Bros., Inc., 678 F.2d 1166 (3d Cir. 1982),* which held that a mushroom composting business was not an agricultural operation for purposes of the Federal Labor Standards Act because most of the compost was sold to customers. The court distinguished the present case from *Donovan* in that the defendant used all the compost in the defendant's growing of mushrooms, an agricultural commodity. Therefore, the court held that the composting was an agricultural activity as part of the larger mushroom growing operation. Although the plaintiff's second argument was summarily denied because the issue was not raised at trial, the court held that the change to an indoor composting facility was not a new or radically expanded activity because the same composting had occurred since the start of the mushroom farm. Because none of the exceptions was demonstrated by the plaintiff as applying to the defendant, the court held that the defendant was protected from liability by the right-to-farm act. **Vicwood Meridian Partnership v. Skagit Sand and Gravel, 98 P.3d 1277 (Wash. Ct. App. 2004)**.

PRODUCT LIABILITY

ANTIQUE TRACTOR. The plaintiff's decedent had purchased an antique tractor from the defendants. Although the decedent had brought a trailer to carry the tractor back to the decedent's farm, the tractor was too wide for the trailer and the decedent had to drive the tractor back. The decedent had tested the brakes on the tractor before starting the trip and the tractor was able to handle many hills before the accident. However, at one hill, the tractor lost power and rolled backwards. The decedent was unable to stop the tractor using the brakes and was killed when the tractor rolled over. The plaintiff sued in negligence, claiming that the defendant sold the tractor without sufficient brakes. Trial evidence provided some indication that the decedent had driven the tractor with the brakes engaged, causing the brakes to wear out. The trial jury found that the decedent had been more than 51 percent negligent in the accident. In response to a jury question, the trial judge answered that the jury did not have to apportion fault between the plaintiff and defendant. The plaintiff appealed, arguing that the decedent was not negligent as a matter of law and that it was reversible error for the trial judge not to require the jury to apportion negligence between the parties. The appellate court held that, once the jury determined that the plaintiff was more than 51 percent at fault, an apportionment of fault was not necessary because the jury determination settled the issue of negligence in favor of the defendant, barring recovery by the plaintiff. The appellate court also upheld the jury verdict as supported by sufficient evidence that the decedent had improperly driven the tractor with the brakes engaged, causing the brakes to fail and the accident to occur. **Payne v. Knutson, 99 P.3d 200 (Mont. 2004)**.

CITATION UPDATES

Sierra Club v. Seaboard Farms, Inc., 387 F.3d 1167 (10th Cir. 2004) (hog confinement system) see 15 *Agric. L. Dig.* 171 (2004).

IN THE NEWS

ENVIRONMENTAL LAW. The Environmental Protection Agency has announced a landmark air quality compliance agreement they say aims to address emissions from certain animal feeding operations. As part of the plan, the EPA will ensure such operations comply with the Clean Air Act, and will gather the scientific data needed to make informed air policy going forward. Participants will pay a civil penalty for presumed violations of the Clean Air Act of between $200 and $100,000 based on the size and number of farms in their operation. They will also contribute $2,500 to a fund that will cover the cost of the emissions monitoring program. See **http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/agNews_050124crEPA.xml&catref=ag1001**

NATIONAL ANIMAL IDENTIFICATION SYSTEM. The U.S. Department of Agriculture's Animal and Plant Health Inspection Agency (APHIS) has created a website that will provide information for livestock producers about the new program. In addition to details on the USDA program, the website also lists contacts and information on state-specific authorities. In the future, APHIS says they will expand the site to also include specie-specific information for producers. Identification systems for cattle, sheep, poultry, deer and other livestock are still in the works. See **http://animalid.aphis.usda.gov/nais/index.shtml**

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