CASES, REGULATIONS AND STATUTES

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BANKRUPTCY

GENERAL

AVOIDABLE LIENS. In a divorce decree, the debtor was awarded possession of the marital residence until the children had reached majority or had moved out. Under the divorce decree, the debtor's spouse's parents held two liens against the property which entitled them to the proceeds of the sale of the house, up to the amount of the liens, after the debtor's possession right terminated. The debtor sought to avoid the parent's liens as impairing the debtor's homestead exemption. The court held that the liens could not be avoided as judicial liens because under state law the equitable distribution of property in a divorce proceeding was a "special declaration of statute" and not a judicial lien. In addition, the liens could not be avoided because the exemption was impaired by the divorce decree and not the liens. ***In re* Reinders, 138 B.R. 937 (Bankr. N.D. Iowa 1992)**.

DISMISSAL. The debtor corporation was established by an individual who had filed for personal Chapter 11 bankruptcy involving a ranch business. The creditors had obtained relief from the automatic stay and the individual's attempts to stay foreclosures during appeals failed. In an attempt to further forestall the foreclosures, the individual established the debtor corporation in another state and transferred the ranch assets to the corporation, although the court in the individual's bankruptcy case had ordered the individual not to transfer the assets. The court held that the debtor corporation's case be dismissed for bad faith filing because of the serial filing by the ranch business, the transfer of assets in violation of the bankruptcy court order and the continued unlikelihood that the debtor corporation could successfully reorganize. ***In re* Coones Ranch, Inc., 138 B.R. 251 (Bankr. S.D. 1991)**.

EXEMPTIONS.

ANNUITY. The debtor purchased an annuity in July 1988 but made the commencement date of payments after the filing for bankruptcy. The court held that because no conditions remained, except passage of time, for payment of the annuity, the annuity matured on the date of purchase and not the date of the first payment. The annuity was not eligible for an exemption because the payments were not reasonably necessary for the support of the debtor. ***In re* Moffat, 959 F.2d 740 (9th Cir. 1992), *aff'g*, 119 B.R. 201 (Bankr. 9th Cir. 1990)**.

IRA. The debtor claimed an interest in an IRA as exempt under 31 Okla. Stat. § 1(A)(20). The bankruptcy court held that the statute was unconstitutional as impairing existing contracts. The appellate courts held that the exemption was constitutional because the exemption was reasonable and narrowly tailored to accomplish a specific purpose. The courts also held that the exemption was not pre-empted by ERISA. ***In re* Walker, 959 F.2d 894 (10th Cir. 1992), *aff'g*, 139 B.R. 31 (N.D. Okla. 1990), *rev'g*, 108 B.R. 769 (Bankr. N.D. Okla. 1989)**.

PENSION PLAN. The debtor claimed an interest in an ERISA qualified pension plan as exempt. The debtor had terminated employment and had the power to require distribution from the plan at any time. The court held that the debtor's interest in the plan was not excludible from the bankruptcy estate because the plan no longer qualified as a spendthrift trust under state law. ***In re* Reid, 139 B.R. 19 (Bankr. S.D. Cal. 1992)**.

PERSONAL INJURY CLAIMS. The debtor listed as exempt, under Minn. Stat. § 550.37, the debtor's interest in a personal injury claim. The court held that the exemption statute was unconstitutional as to special damages accruing before the personal injury petition in that the statute set no limit on the exemption. The court also held that the exemption did not apply to punitive damages. The court allowed the exemption as to the personal injury claim as to general damages. ***In re* Cook, 138 B.R. 943 (Bankr. D. Minn. 1992)**.

FEES. The debtor filed for bankruptcy through a bankruptcy service which provided forms and general assistance in filling out the forms. The court held that the service was engaged in the unauthorized practice of law and would be required to return to the bankruptcy estate all fees paid by the debtor. ***In re* Herren, 138 B.R. 989 (Bankr. D. Wyo. 1992)**.

CHAPTER 11

PLAN MODIFICATION. Part of the debtor's confirmed Chapter 11 plan was an agreement with a secured creditor for payment of the secured claim over 25 years. The debtor made the initial lump sum payment and the first annual installment but filed for modification of the payment terms after the second annual payment was missed. The modification sought to decrease the principal to the current fair market value of the property and added amortization of the amount in default under the plan. The court denied the modification because the plan was otherwise substantially consummated and the original plan terms were obtained by agreement of the debtor and creditor. ***In re* Stevenson, 138 B.R. 964 (Bankr. D. Idaho 1992)**.

CHAPTER 12

CONVERSION. The debtors had filed a Chapter 12 case and obtained confirmation of their plan which provided for payment of an amount of cash from the sale of crops to the trustee for distribution to creditors. The proceeds from the crops were insufficient to fund this portion of the plan and the debtors converted the case to Chapter 7. The debtors claimed a portion of the proceeds as exempt property. The trustee argued that the proceeds vested in the creditors in the Chapter 12 case and could not be claimed as exempt. The court held that the interests of the Chapter 12 creditors did not vest in the proceeds until the creditors were paid and that upon conversion the proceeds became part of the Chapter 7 estate, subject to the debtors' exemption rights. ***In re* Plata, 958 F.2d 918 (9th Cir. 1992)**.

FEDERAL TAXATION

ADMINISTRATIVE EXPENSES. The IRS filed an administrative expense claim for taxes incurred by the debtor post-petition. The court held that the taxes incurred post-petition but pre-confirmation were allowed as an administrative expense; however, taxes incurred post-confirmation were the personal liability of the debtor and not an administrative expense of the bankruptcy estate. **Fullmer v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,237 (10th Cir. 1992)**.

ALLOCATION OF PLAN PAYMENTS FOR TAXES. The Chapter 11 debtor sought allocation of payments for tax claims to pre-petition taxes before application to post-petition taxes. The court joined the Third, Sixth, and Ninth Circuits in holding that Chapter 11 plan payments of taxes were involuntary and not required to be allocated as the debtor requested. **Fullmer v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,237 (10th Cir. 1992)**.

AUTOMATIC STAY. The IRS had levied against the debtor's interests in two IRA's and one week later the debtor filed for Chapter 7 bankruptcy. The debtor sought to stop the IRS from further action against the accounts but the IRS completed the levy and seized the amounts in the accounts. The debtor sought recovery of the amounts taken and sanctions for violation of the automatic stay. The court held that because the levy was against cash or cash equivalents, the notice of levy transferred ownership immediately to the IRS, and therefore, the IRA's never became estate property subject to the automatic stay. **McLaughlin v. I.R.S., 139 B.R. 9 (N.D. Ohio 1991)**.

AVOIDABLE TRANSFERS. Although this case involved primarily an issue of class action, the underlying action identifies a current issue of avoidable transfers. The debtor had employed a tax return preparer to prepare federal income tax returns. Because the debtor was entitled to a refund, the preparer helped the debtor obtain an "instant refund" through a loan with a bank, under which the bank would receive direct payment from the IRS when the refund was issued. The trustee sought avoidance of the payment of the refund to the bank within 90 days before the debtor filed for bankruptcy as a preferential transfer or improper setoff. This issue was not ruled upon in this case but should give fair warning to creditors who participate in such programs that the IRS refund may not be secure. ***In re* Weisbrod, 138 B.R. 869 (Bankr. S.D. Ohio 1992)**.

DISCHARGE. The debtors sought discharge of their 1986 federal income taxes which were filed in September 1987. The IRS argued that an extension to file had been granted, extending the filing date to August 1987, within three years of the debtors' bankruptcy filing. The debtors argued that the extension was void because the extension application did not make a reasonable estimation of the taxes due. The court held that the extension was timely made and not denied by the IRS and, therefore, was effective to extend the filing date to within three years of the bankruptcy filing, making the taxes nondischargeable. ***In re* Gidley, 138 B.R. 289 (Bankr. M.D. Fla. 1992)**.

The debtor had obtained a judgment that a late filed claim of the IRS was disallowed; however, the IRS sent the debtor an assessment notice for the taxes involved in the disallowed claim during the appeals of the disallowance ruling. The IRS, however, told the debtor that it would not attempt any enforcement of the assessment until the appeal was settled. The court held that the assessment violated the discharge injunction of Section 524(a) but that the assessment would be allowed to stand because no harm was done to the debtor. ***In re* Norris Grain Co., 138 B.R. 1004 (Bankr. M.D. Fla. 1992)**.

NET OPERATING LOSSES. In a case under the Bankruptcy Act of 1898, the court held that the debtor's pre-bankruptcy net operating losses could not be used by the bankruptcy estate in filing its federal income tax return. ***In re* Luster, 138 B.R. 875 (N.D. Ill. 1992), *rev'g*, 134 B.R. 632 (Bankr. N.D. Ill. 1991)**.

In a case under the Bankruptcy Act of 1898, the court held that the debtor's pre-bankruptcy net operating losses could not be used by the bankruptcy estate in filing its federal income tax return. The court also held that post-petition federal income taxes received first priority as administrative costs. **In re Friedman, 138 B.R. 881 (N.D. Ill. 1992), *rev'g*, 134 B.R. 632 (Bankr. N.D. Ill. 1991)**.

TAX LIENS. In 1989, the IRS filed a notice of tax lien for federal taxes owed by the debtor. The debtor argued that, under I.R.C. § 6323, the lien did not attach to the debtor's interest in an employee stock option plan because the plan was a security and the bankruptcy trustee took possession of the interest as a good faith purchaser. The court held that the stock option plan was not a security and the trustee was not a good faith purchaser because the trustee paid no consideration for the estate's acquisition of the debtor's interest in the plan. ***In re* McNitt, 139 B.R. 21 (Bankr. D. Idaho 1992)**.

CONTRACTS

EXCUSED PERFORMANCE. The plaintiff was a commodities broker who entered into a contract to buy corn from a producer, the defendant. The corn was to be delivered to a customer of the plaintiff; however, the defendant was unable to make timely delivery because the buyer had no storage. When the buyer had storage again, the producer no longer had any corn and the plaintiff sued for the cost of replacement corn. The court held that the defendant's performance was excused by the actions of the buyer in refusing timely delivery offers. The plaintiff had also entered into a contract to purchase corn flour from the defendant but cancelled the contract after the plaintiff's buyer refused most of the flour. The defendant told the plaintiff that another buyer would be sought and sued the plaintiff for the difference in the sale price obtained from a subsequent buyer. The court held that the plaintiff had sufficient notice of the resale to another buyer. **Eades Commodities,**

Co. v. Hoeper, 825 S.W.2d 34 (Mo. Ct. App. 1992).

FEDERAL AGRICULTURAL PROGRAMS

MARKETING ORDERS. The plaintiffs were handlers of navel oranges who challenged the weekly announcement of the limit on the quantity of navel oranges which could be shipped. The plaintiffs argued that the procedure did not comply with the Administrative Procedures Act notice and comment requirements. The court upheld the procedure because the annual order setting the general weekly restrictions did comply with the notice and comment requirements and the weekly recommendations of the Navel Orange Administrative Committee were reached after public hearings. The USDA's use of the NOAC's recommendation was not arbitrary or capricious because the USDA had the power to not use the recommendations. **Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (9th Cir. 1992)**.

PACA. The bankruptcy debtor had purchased produce from the creditor and the creditor sought relief from the automatic stay to recover the purchase price from the PACA trust fund. The parties had agreed in writing to payment within 30 days after invoice, which was greater than the 10 day payment provision of PACA, but the creditor failed to include the extended payment term on the invoices as required by PACA. The court held that the clear failure to comply with the statutory requirement that the extended payment terms be listed on the invoices caused the creditor to lose any rights in the PACA trust fund. ***In re* San Joaquin Food Service, Inc., 958 F.2d 938 (9th Cir. 1992)**.

PAYMENT LIMITATIONS. The plaintiffs operated a family farm corporation which farmed land owned by the corporation and land leased to the corporation. In 1984, the corporation and plaintiffs were determined to be one "person" for payment limitation purposes. The plaintiffs transferred 50 percent of the corporation to their two daughters, individually farmed the leased acres and leased equipment from the corporation. The plaintiffs sought a determination that they were eligible as four "persons" for payment limitation purposes but were rejected through appeals to DASCO. Although the plaintiffs focused their arguments against the ASCS handbook standards, the court held that under the regulations, the plaintiffs had not made any substantive change in the farming operation to warrant an increase in the number of "persons" eligible for payments. The court also held that the handbooks were interpretative in nature and not subject to the notice requirements of the Administrative Procedures Act. **Schultz v. U.S., 25 Cls. Ct. 384 (1992)**.

The plaintiffs were three brothers who had formed a farm partnership and who were shareholders in a farm corporation. During 1987 the partnership paid some of the corporation's labor costs and the three brothers transferred equipment to the corporation which was not paid for by the corporation for several months. The ASCS determined that the brothers, the partnership and corporation were only one "person" for payment limitation purposes. The court upheld the determination because (1) the corporation received financial assistance (labor costs and equipment use) from another entity, (2) the loan of money and equipment to the corporation was not a family loan because the corporation was not related to the shareholders, and (3) the regulations provided no exception for insignificant amounts of financing. **Bar 9 Farms, Inc. v. U.S., 25 Cls. Ct. 392 (1992)**.

PESTICIDES. The plaintiff purchased property which was owned by a wood treatment facility which used a pentachlorophenol product. When an employee of the plaintiff became ill with pentachlorophenol poisoning, the plaintiff sued the chemical manufacturer for negligence and strict liability for failure to warn. The manufacturer argued that the state court action was prevented by preemption of FIFRA. Although noting a split of authority on the issue, the court held that FIFRA's labeling requirements impliedly preempt a state law negligence action for failure to warn. **Arkansas-Platte & Gulf v. Van Waters & Rogers, 959 F.2d 158 (10th Cir. 1992), rev'g, 748 F.Supp. 1474 (D. Colo. 1990)**.

The plaintiff sued the manufacturer of a pesticide for injury to the plaintiff's soybean crop. The plaintiff based the claims on negligence in failure to warn and breach of express warranties and implied warranties of merchantability and fitness for purpose. The defendant argued that FIFRA labeling requirements preempt any state court action for failure to warn. The court agreed. The defendant also argued that the warranties were disclaimed on the labels. The court held that the effectiveness of the disclaimers involved factual questions to be resolved by the trier of fact and denied summary judgment for the defendant on the warranty issues. **Young v. American Cyanamid Co., 786 F. Supp. 781 (E.D. Ark. 1991)**.

PRICE SUPPORT LOANS. The plaintiffs were corn producers who had obtained several CCC price support loans with their grain as collateral. The grain was stored at several locations, including several bins leased by the plaintiffs. The ASCS inspectors made several inspections of the stored grain and although the grain was rated "satisfactory," the inspectors noted problems with mold, water damage and weevil infestation. The county committee requested that the plaintiffs either rotate the stored corn or otherwise improve the storage and submit written lease extensions to demonstrate that the plaintiffs would have sufficient storage for the collateral corn. When the rotation and leases were not forthcoming, the county ASCS called all of the loans and required delivery of the grain or payment of the loans. The court held that the actions of the ASCS were not arbitrary and were within ASCS authority to protect the corn collateral. The court also found that the ASCS acted with due process, although several decisions did not notify the plaintiff of appeal rights, in that the plaintiff did appeal most decisions and had ample opportunity to obtain explanations and bases for the ASCS decisions. The court ruled that the calling of the loans was not an unconstitutional taking in that the transactions were proprietary and not sovereign acts of a governmental agency. **Gratz v. U.S., 25 Cls. Ct. 411 (1992)**.

SEASONAL AGRICULTURAL LABOR. The plaintiffs were seasonal agricultural workers hired by an unregistered labor contractor who was hired by the defendant to obtain laborers for use in the defendant's labor contracting business. The contractor paid the plaintiffs wages and withheld employment taxes but failed to pay the withheld taxes to the IRS. The contractor also failed to maintain adequate work records and wage statements and to file W-2 forms. The plaintiffs were injured while riding in a van owned by the contractor on their way to a potential work site but the van was not covered by auto insurance. The defendant was cited for several violations of the Migrant and Seasonal Agricultural Worker Protection Act. The defendant argued that the act did not apply because the plaintiffs were hired by the contractor. The court held that the definition of "employ" for purposes of MSAWPA includes persons who assign employment duties to third party contractors. The court held that the defendant had violated the registration verification requirements by not requiring the contractor to be registered; the recordkeeping requirements because the contractor did not maintain wage and hour records; the wage statement requirement because the contractor did not provide wage statements with the wages paid; and the vehicle insurance requirement. **Saintida v. Tyre, 783 F.Supp. 1368 (S.D. Fla. 1992)**.

FEDERAL ESTATE AND GIFT TAX

MARITAL DEDUCTION. The decedent's will bequeathed all property to the surviving spouse in trust with the daughter as trustee. The property was held in two funds. The trustee had the power to distribute property of one fund to the daughter with the consent of the spouse. The court held that the property in that fund was not eligible for the marital deduction as QTIP because trust property could be appointed to someone other than the surviving spouse. **Est. of Manscill v. Comm'r, 98 T.C. No. 30 (1992)**.

The decedent's estate included an interest in an IRA of which a marital trust was the designated beneficiary. The IRA trust agreement provided three options for payouts from the IRA, none of which required all income of the IRA to be paid at least annually to the beneficiary. The marital trustee selected one of the payout options but directed that the IRA distribute all income at least annually. The IRS held that the IRA funds in the marital trust were not eligible for QTIP because none of the payout options required at least annual payments of all income. The trustee's amendment to the payout election was not sufficient to remedy the defect because the property must meet the QTIP requirements at the time it passes from the decedent to the trust. **Ltr. Rul. 9220007, Jan. 30, 1992**.

SPECIAL USE VALUATION. The decedent's estate included a majority interest of voting preferred stock in a family ranch corporation. The decedent made all management decisions in the operation of the ranch and had transferred shares in the corporation to children and grandchildren such that, at the date of death, the other family members owned all of the voting common stock and a minority of the voting preferred stock. The preferred stock holders were entitled to redeem their shares at par value plus unpaid dividends; the common stock had no par value and was entitled to be redeemed only after the preferred stock. The estate elected the special use valuation method and valued the decedent's preferred stock by first determining the percentage of value of the stock to all stock and then allocating that percentage to the special use value of the ranch land. The IRS ruled that the special use value of the corporation must first be determined which would then determine how much each preferred share would receive on redemption in liquidation. The value of the decedent's preferred shares for special use valuation purposes would then equal the amount for each share times the number of shares held by the decedent. Therefore, if the special use valuation was less than the amount entitled to be received by the preferred shares, no value would be allocated to the common stock. The IRS noted that the voting control of the decedent would not add any premium to the decedent's shares. The IRS cited to *Rev. Rul. 59-60, 1959-1 C.B. 237* and *Rev. Rul. 83-120, 1983-2 C.B. 170* for rulings on valuation of preferred stock. **Ltr. Rul. 9220006, Jan 29, 1992**.

TRANSFERS WITH RETAINED INTERESTS. Within three years of the decedent's death and when the decedent was in remission from cancer, the decedent transferred the residence to a sole heir in exchange for a mortgage, less $20,000 as a gift. The sale contract allowed the decedent to live in the house for rent equal to the interest payments on the mortgage. In the penultimate and last years of the decedent's life, another $20,000 of mortgage was forgiven each year. The decedent's will also caused the remaining amount on the mortgage to be forgiven. The court held that the substance of the transaction was only an attempt to avoid tax and included the entire value of the residence in the decedent's estate. **Est. of Maxwell v. Comm'r, 98 T.C. No. 39 (1992)**.

TRUSTS. An irrevocable trust was established for each of five children of the grantors. The beneficiaries were entitled to at least quarterly payments of trust income and the trustee had the power to invade corpus for the support, maintenance and education of the beneficiary if income was insufficient. Upon reaching age 40, a beneficiary could withdraw all corpus from the trust. The beneficiaries obtained a court ordered agreement with the trustee eliminating the beneficiaries' power to invade corpus after reaching age 40, but two of the beneficiaries reached age 40 before the agreement was approved. The IRS ruled that gain or loss from the sale of trust assets prior to the agreement and after the two beneficiaries reached age 40 was reportable by the beneficiaries who had reached age 40. After the agreement, the gains or losses were reportable by the trust as to all beneficiaries. **Ltr. Rul. 9220012, Feb. 7, 1992**.

VALUATION. The decedent was an artist with over 400 art pieces in the gross estate. The artwork was divided by the court into two groups based on the ability of the estate to sell the pieces relatively quickly or slowly at near fair market value. The first group was discounted 25 percent and the second group was discounted 75 percent in valuation for estate tax purposes. **Est. of O'Keeffe v. Comm'r, T.C. Memo. 1992-210**.

FEDERAL INCOME TAXATION

CAPITAL ASSETS. The taxpayers were partners in a partnership which purchased land and held the land for three years before selling the land to a related entity for development of a shopping center. The court held that the gain from the sale was taxable as capital gain because the partnership was not in the business of buying and selling land but held the land as a means of investment. **Bramblett v. Comm'r, 92-1 U.S. Tax Cas. (CCH) ¶ 50,252 (5th Cir. 1992), *rev'g*, T.C. Memo. 1990-296**.

C CORPORATIONS

CAPITAL CONTRIBUTIONS. The taxpayer contributed funds to a corporation owned by the taxpayer's brother-in-law and claimed the contribution as a bad debt deduction upon termination of the corporation. The court held that the contribution was a capital contribution and not a loan because no loan agreement was executed, no collateral was obtained for the loan amount, and the taxpayer received a share in the corporation in exchange for the contribution. **Greenberg v. Comm'r, T.C. Memo. 1992-292**.

DEDUCTIONS. The taxpayers were not allowed loss deductions incurred as part of a purchase and leaseback of a motor home to a dealer because the transaction lacked any profit motive or expectation. **Johnson v. Comm'r, T.C. Memo. 1992-288**.

DEPLETION. The taxpayer was the surviving spouse who owned, as community property, interests in oil and gas properties. The decedent spouse died on March 18, 1989 and the surviving spouse filed a joint 1989 tax return for the decedent's short taxable year and the surviving spouse's full taxable year. The IRS ruled that the decedent's return would include the depletion amount for the short taxable year based upon the decedent's basis in the decedent's one-half community property interest and the surviving spouse would determine the depletion allowance based upon the surviving spouse's basis in the entire property as of December 31, 1989. The surviving spouse's basis in the property would include the fair market value of the decedent's interest of the property as determined for estate tax purposes. **Rev. Rul. 92-37, I.R.B. 1992-21, 5**.

EMPLOYEE BENEFITS. The IRS has revoked Notice 89-45, 1989-1 C.B. 684 as to the application of the 10-year phase-in rules of I.R.C. § 415(b)(5) as to the limitations on annual benefits which may be paid or accrued under qualified benefit plans for employees with 10 or fewer years of participation. The new rule does not require separate application of the limitation for each change after August 3, 1992. Employers may elect to retroactively apply the rule. **Rev. Proc. 92-42. I.R.B. 1992-22, 12**.

The IRS has issued a proposed revenue procedure providing simplified procedures for the data collection and testing for substantiation of compliance with nondiscrimination rules. **Ann. 92-81, I.R.B. 1992-22, 10**.

The IRS has issued simplified procedures for amending master and prototype, regional prototype and volume submitter plans to take advantage of the liberalized rules in final regulations under I.R.C. §§ 401(k), (m) and the new definition of of compensation under I.R.C. § 414(s) and Treas. Reg. § 1.415-2(d)(11)(i). **Rev. Proc. 92-41, I.R.B. 1992-21, 23**.

HEALTH INSURANCE. A reminder that the deduction from gross income for self-employed persons of 25 percent of the cost of health insurance is due to expire June 30, 1992, unless extended by passage of introduced legislation.

INSTALLMENT REPORTING. The taxpayers claimed an interest expense deduction from the installment sale of a condominium. The taxpayers claimed that the sale was completed in June 1983 but the evidence showed that the buyers did not have the benefits and burdens of ownership in June 1983. The court held that the interest deduction was not allowed under I.R.C. § 483 because the first installment, paid in December 1983 was not received more than six months after the sale. **Williams v. Comm'r, T.C. Memo. 1992-269**.

IRA'S. The IRS has ruled that individual retirement arrangement trusts, custodial account agreements and annuity contracts must be amended to provide for the required distributions rule of I.R.C. §§ 408(a)(6), (b)(3). The revenue procedure also modifies the procedures for opinion letters issued to sponsoring organizations. **Rev. Proc. 92-38, I.R.B. 1992-20, 23**.

INVESTMENT TAX CREDIT. The taxpayer operated grocery stores and claimed investment tax credit for central heating, ventilation and cooling systems. The taxpayer argued that the machinery was eligible, under Treas. Reg. § 1.48(e)(2), because the machinery was necessary for the the sole purpose of temperature and humidity requirements for refrigeration cases in the stors. The court held that the taxpayer failed to demonstrate that the sole justification for the machinery was for the refrigeration cases. **Publix Supermarkets, Inc. v. U.S., 92-1 U.S. Tax Cas. (CCH) ¶ 50,240 (Cls. Ct. 1992)**.

After failing for two years to sell real property which included investment tax credit property, the partnership contributed the property to another partnership in exchange for a 25 percent interest in that partnership. An insurance company contributed cash in exchange for the remaining partnership interest. Some of that cash was distributed to the original partnership to equalize the partners' interests in the new partnership. The court held that the investment tax credit was recaptured because the contribution of the property to the partnership was a sale to the insurance company and not a mere change in the form of doing business. **Jacobson v. Comm'r, 92-1 U.S. Tax**

Cas. (CCH) ¶ 50236 (8th Cir. 1992), aff'g, 96 T.C. 577 (1991).

The taxpayer operated a mushroom growing facility and claimed investment tax credit for a compost wharf, pasteurization unit and grow unit. The court held that the equipment was eligible for investment tax credit except that only 5 percent of the grow unit was eligible because only 5 percent of the unit was used in the business in the first year the unit was placed in service. In addition, legal and accounting expenses were not allowed as current deductions, but required to be capitalized, where the taxpayer failed to provide evidence separating start-up costs from current operational costs. **Oregon Trail Mushroom Co. v. Comm'r, T.C. Memo. 1992-293**.

LEVY. The IRS has issued proposed regulations increasing the amount of some exemptions and adding property to the list of exemptions from levy as required by TAMRA 1988. **57 Fed. Reg. 22189 (May 27, 1992)**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. The tax matters partner filed for personal bankruptcy and the partnership ended the partner's designation as tax matters partner. The IRS sent a final partnership administrative adjustment to the partner after the termination of the partner's status as TMP and sent the FPAA to the notice partners after the statute of limitations on assessments had run. The IRS agreed with the partnership that the mailing of the FPAA to the former TMP was ineffective to toll the statute of limitation on assessment. The court held that the statute of limitations was an affirmative defense and not a jurisdictional question and allowed summary judgment for the partnership. **Columbia Building, Ltd. v. Comm'r, 98 T.C. No. 40 (1992)**.

S CORPORATIONS

CONSTRUCTIVE DIVIDENDS. The taxpayer was a partner with three of the taxpayer's brothers, all of whom had almost unlimited authority to withdraw funds from the partnership. The taxpayer made excessively large withdrawals and the IRS characterized much of the withdrawals as constructive dividends, but the taxpayer argued that the withdrawals were loans. The court held that the withdrawals were constructive dividends because no loan documents were made and no interest was charged until after an IRS audit. **Crowley v. Comm'r, 92-1 U.S. Tax Cas. (CCH) ¶ 50,235 (1st Cir. 1992),** ***aff'g*****, T.C. Memo. 1990-636**.

ONE CLASS OF STOCK. The IRS has adopted as final regulations governing the one class of stock requirement under I.R.C. § 1361. The final regulations generally follow the proposed regulations, see 2 *ALD* p. 150; however, the final regulations change the second condition under which an obligation is not treated as a second class of stock-- where "a principal purpose of the obligation is to circumvent the rights conferred by the corporation's outstanding stock or to circumvent the limitation on eligible shareholders." **57 Fed. Reg. 22646 (May 29, 1992)**.

PRODUCTS LIABILITY

COMBINE. The plaintiff injured a foot while attempting to clear the grain discharge auger on a combine manufactured by the defendant. The plaintiff asserted that the defendant was liable because of a failure to adequately warn about the danger of clearing the auger while in the discharge tank. The manufacturer argued that it was not liable for failure to warn where the plaintiff was shown to be aware of the danger and knowingly assumed the risks of cleaning the auger while in the discharge tank. The jury had found the plaintiff 41 percent negligent and the manufacturer 59 percent negligent. The court held that under the statutory doctrine of comparative negligence, the assumption of risk defense was not an absolute bar to recovery and the parties' relative negligence was an issue for the jury. The court upheld the jury verdict as supported by the evidence of negligence by both parties. **Watson v. Navistar Intern. Transp. Corp., 827 P.2d 656 (Idaho 1992)**.

TARPAULIN. The defendant purchased from the plaintiff a tarpaulin for covering a temporary storage of grain. The delivered tarpaulin arrived late and was smaller than ordered, causing some grain to be unprotected. In a suit by the plaintiff for the purchase price, the defendant counterclaimed for the value of the unprotected grain which spoiled. The trial court awarded the defendant the return of the downpayment and ordered the return of the tarpaulin, holding that a liability limitation clause in the sales contract prevented the defendant from recovering consequential damages. The defendant argued that the limitation clause was unenforceable because it was overbroad, vague and inconspicuous. The court held that the element of conspicuousness was not appropriate for an action not involving breach of warranty and that the limitation clause was not overbroad or vague because it referred only to liability involving the grain. **Rayner Covering v. Danvers Farmers Elevator, 589 N.E.2d 1034 (Ill. Ct. App. 1992)**.

RIPARIAN RIGHTS

JURISDICTION. The plaintiff challenged a 1987 Water Court decree granting the defendants in-stream flow rights. The plaintiff argued that the Water Court did not have jurisdiction to grant the in-stream rights to a private party. The appellate court held that an erroneous decision by the Water Court did not affect the subject matter jurisdiction of the Water Court over in-stream flow rights. Because the Water Court had jurisdiction, the plaintiff was barred from challenging the decree by the statute of limitations. The court also held that the published resume notice of the application for the in-stream water rights was sufficient notice to the plaintiff of the original application to bar the plaintiff's challenge. **Board of County Commissioners v. Collard, 827 P.2d 546 (Colo. 1992)**.

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TRESPASS

TIMBER. The plaintiff sold timber land to a third party under an installment contract which required written permission of the plaintiff for any timber cutting or removal during the contract. While the third party was current on the payments and in possession of the property, the third party hired the defendant to cut and remove timber to clear land for a house. The court held that under Ga. Code § 51-12-51, the plaintiff held sufficient interest in the title to the land to bring the action for recovery of the value of the timber removed, but a material issue of fact remained as to whether the plaintiff had complied with the statute as to filing the plaintiff's interest in the land in the county where the land was located. **Southern Land & Cattle Co. v. Simmons, 415 S.E.2d 329 (Ga. Ct. App. 1992)**.

ZONING

AGRICULTURAL USE. The county Land Use Board of Appeals (LUBA) granted an owner of land zoned as exclusive farm use land the right to construct a second residence on the property for a son and daughter-in-law. The LUBA allowed the construction because the owner was a farm operator, but the LUBA did not rule on the issue of whether the relatives' residence on the farm was necessary for the owner's assistance in operating the farm. Most of the farm was leased to third parties, leaving only a nine acre pasture which was used to pasture a horse. The court remanded the case back to the LUBA and held that the LUBA was required to rule on both issues in order to grant the application to build the second residence under Or. Rev. Stat. § 215.283. **Kenagy v. Benton County, 826 P.2d 1047 (Or. Ct. App. 1992)**.

CITATION UPDATES

Weiser v. U.S., 959 F.2d 146 (9th Cir. 1992), aff'g, 746 F.Supp. 958 (N.D. Calif. 1990) (alternative minimum tax) see p. 69 *supra*.

***In re* Brazier Forest Products, Inc., 138 B.R. 265 (Bankr. W.D. Wash. 1991)** (capital gains for affiliated corporations) see p. 6, *supra*.

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