[3] Treas. Reg. § 1.451-2(a).
[4] See, e.g., Duffy v. Comm'r, T.C. Memo. 1996-556 (taxpayer not in constructive receipt for wages withheld to cover excess travel advances where taxpayer disputed liability for excess advances).
[5] Baxter v. Comm'r, 816 F.2d 493 (9th Cir. 1987), *rev'g on this issue*, T.C. Memo. 1985-378.
[6] John Single, Jr. v. Comm'r, T.C. Memo. 1988-549.
[7] Bright v. United States, 91-1 U.S. Tax Cas. (CCH) ¶ 50,142 (5th Cir. 1991).
[8] *Id*.
[9] Ltr. Rul. 9651020, Sept. 19, 1996.
[10] *Id*.
[11] Rev. Rul. 60-31, 1960-1 C.B. 174.
[12] Childs v. Comm'r, 96-2 U.S. Tax Cas. (CCH)¶ 50,504 (11th Cir. 1996).
[13] See, e.g., Romine v. Comm'r, 25 T.C. 859 (1956) (constructive receipt as to livestock sold and delivered one year with proceeds received early the following year).
[14] Rev. Rul. 58-162, 1958-1 C.B. 234.
[15] See I.R.C. § 453(b)(2)(B).
[16] Harl, "Installment Sales of Commodities and AMT," 7 *Agric. L. Dig.* 93 (1996); Harl, "More on Installment Sales of Commodities and AMT," 7 *Agric. L. Dig.* 173 (1996).
[17] Rev. Rul. 68-44, 1968-1 C.B. 191. Compare Rev. Rul. 60-32, 1960-1 C.B. 29 (payments under Soil Bank Act as income from "the normal use of the land devoted to the program" were income in year received).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

PRESCRIPTIVE EASEMENT. The plaintiffs owned land which surrounded the land owned by the defendants such that the only access to the defendants' land was over routes crossing the plaintiffs' land. The plaintiffs brought an action to quiet title to prohibit the defendants from crossing the plaintiffs' land. The trial court ruled that the defendants had acquired a prescriptive easement to one route over the plaintiffs' land. The plaintiffs argued on appeal that the defendants' use of that route was permissive and not adverse to the plaintiffs' ownership. This argument was based on the actions of the plaintiffs' predecessors in interest who had prohibited the defendants from using one route and had allowed the defendants to use the route for which the prescriptive easement was found. The court held that the evidence showed that the predecessors in interest had warned the defendants not to use any route and had posted "no trespassing" signs on the route used by the defendants. The court held that the defendants' continued use of the route after these actions demonstrated that the use was adverse and not permissive. The plaintiff also claimed that there was evidence that the defendants consulted with the predecessors in interest about improving the road and building a bridge on the route. The court held that the trial court had the discretion whether to find this evidence credible and that finding was not appealable. **Rafanelli v. Dale, 924 P.2d 242 (Mont. 1996)**.

ANIMALS

HORSES. The plaintiff was a three-year-old child who was visiting, with the plaintiff's family, a neighbor of the defendant. While the plaintiff was playing in the neighbor's yard, the plaintiff wandered into a horse pasture on the defendant's property where the plaintiff was injured when a horse kicked the plaintiff. The plaintiff filed an action in negligence and attractive nuisance. The pasture was enclosed by a wire electric fence but the electricity was not turned on at the time of the accident. The neighbor had been specifically warned not to enter the pasture. The plaintiff argued that the defendant was negligent because the fence was insufficient to keep the child out of the pasture. The court found that the horse involved was not known to be aggressive and the fence was shown to be in good repair. The court concluded that there was no evidence that the defendant had not exercised reasonable care in fencing in the horse. The plaintiff also argued that, because the defendant had erected an electric fence, the defendant was negligent in failing to have the electricity on at the time of the accident. The plaintiff cited Section 324A Restatement (Second) of Torts for the theory that the erection of the electric fence was an undertaking and the failure to electrify the fence was negligence in that undertaking. The court held that Section 324A was applicable only where the defendant undertook to perform a service for the injured party. The court upheld the jury verdict for the defendant. The plaintiff had also argued that the attractive nuisance doctrine should be implemented in Vermont but the court refused, holding that the attractive nuisance doctrine merely provided a lesser standard of negligence in certain circumstances, a basis of action already allowed in Vermont under the general negligence cause of action. **Zukatis by Zukatis v. Perry, 682 A.2d 964 (Vt. 1996)**.

BANKRUPTCY

FEDERAL TAXATION-*ALM* § 13.03[7].*

ASSESSMENT. The debtors filed for Chapter 13 and objected to claims for taxes filed by the IRS, arguing that the debtors were not taxpayers or subject to the federal income tax laws (a form of tax protester argument). The court rejected the argument as frivolous. The debtors also argued that the assessment was not valid because the notice was merely a computer printed form without a signature from an agent. The court also rejected this argument, holding that the statute and regulations do not require a signature on an assessment notice. See *In re Hopkins, 192*

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B.R. 760 (D. Nev. 1995). The IRS then moved to dismiss the case for bad faith, based on the debtors' failure to file the income tax returns. The court dismissed the case for bad faith for failure to file the returns in addition to the frivolous arguments made by the debtors for not filing the returns. ***In re* Hopkins, 201 B.R. 993 (D. Nev. 1996)**.

DISCHARGE. The debtor was employed as a car salesman and overstated the number of dependents on the debtor's W-4 forms. The debtor held several different employments over several years and some employers treated the debtor as an independent contractor and did not withhold any income taxes. The debtor filed fairly accurate tax returns for the periods involved and made a good faith effort to pay the taxes owed. The IRS sought a ruling that the taxes for years more than three years before the bankruptcy filing were nondischargeable for willful attempts to evade taxes. The court held that a pattern of false W-4 forms was not sufficient indication of willful attempts to evade taxes where the debtor filed timely and accurate returns and attempted to pay the taxes. The appellate court reversed, holding that the facts presented sufficient evidence of willful intent to evade taxes to prevent discharge of the taxes. ***In re* Smith, 202 B.R. 277 (S.D. Ind. 1996), *rev'g and rem'g*, 169 B.R. 55 (Bankr. S.D. Ind. 1994)**.

The taxpayer had been assessed for 1987 taxes more than 240 days before the filing of a bankruptcy petition. However, during the period between the assessment and the bankruptcy filing, the taxpayer had signed a waiver of the statute of limitations as part of an offer of compromise. The offer was rejected but appealed. During the appeal an IRS agent sent to the taxpayer a letter indicating that the appeal would be rejected unless the taxpayer included additional items in the offer of compromise. The court held that the letter was sufficient to operate as a rejection of the offer of compromise and terminated the waiver of the statute of limitations; therefore, more than 240 days passed between the assessment and the petition when the waiver was not in existence, and the taxes involved were dischargeable. ***In re* Hobbs, 97-1 U.S. Tax Cas. (CCH) ¶ 50,127 (Bankr. N.D. Iowa 1996)**.

ESTATE PROPERTY. As part of a collection effort, the IRS, on October 3, 1995, served a notice of levy against the debtor's bank account. On October 20, 1995, the debtor filed for Chapter 13 and on October 25, 1995, the bank delivered the amount in the account on the day of the levy to the IRS. The debtor sought turnover of the funds collected from the levy. The issue was whether the funds became property of the estate upon the bankruptcy filing. The court focused on Treas. Reg. § 301.6332-3(c)(2) which provides that interest accruing on a levied bank account during the 21 day wait period is treated as income to the account holder, although the interest is also subject to the levy. The court used this plus the precedent of *Giaimo v. U.S., 194 B.R. 210 (E.D. Mo. 1996)* to hold that the debtor had sufficient interest in the bank account after the levy and during the 21 day wait period for the funds to be estate property. ***In re* Hunter, 201 B.R. 959 (Bankr. E.D. Ark. 1996)**.

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The FCIC has adopted as final regulations which include the Florida Citrus Endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. **61 Fed. Reg. 68998 (Dec. 31, 1996)**.

The FCIC has adopted as final regulations which move the noninsured crop disaster assistance program (NAP) provisions currently in 7 CFR Part 404 to 7 CFR Part 1437, and which implement the amendments to NAP made in Title I of the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act). The 1996 Act changes the administration of the program from the Federal Crop Insurance Corporation (FCIC) to the Secretary through the Commodity Credit Corporation. The NAP program will continue to be operated through the Farm Service Agency (FSA). Other amendments include the addition of seed crops and aquaculture (including ornamental fish) as crops eligible for benefits under this part, and the amendments relax the acreage and production reporting requirements. **62 Fed. Reg. 69004 (Dec. 31, 1996)**.

The FCIC has issued proposed regulations which include the Hybrid Corn Seed Endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. **62 Fed. Reg. 48 (Jan. 2, 1997)**.

The FCIC has issued proposed regulations which include the Fresh Market Sweet Corn Endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. **62 Fed. Reg. 333 (Jan. 3, 1997)**.

The FCIC has issued proposed regulations which include the Pepper Crop Endorsement in the Common Crop Insurance Policy and restrict the endorsement provisions to 1997 and earlier crop years. **62 Fed. Reg. 338 (Jan. 3, 1997)**.

FEDERAL ESTATE AND GIFT TAX

ALIMONY PAYMENTS. The decedent had divorced from the spouse and the divorce decree provided for annual alimony payments. When the decedent died, the surviving ex-spouse filed a claim for arrearages in the alimony payments and eventually received the decedent's entire estate in satisfaction of the arrearages. The estate treated the amount paid as distributive net income. However, the court held that the payments were to be treated as alimony payments, entirely taxable to the surviving ex-spouse and her estate when the ex-spouse died before the distribution. The court held that the decedent's estate was not entitled to a deduction for the payment because the deduction was available only for trusts and individuals. **Kitch v. Comm'r, 97-1 U.S. Tax Cas. (CCH) ¶ 50,124 (10th Cir. 1996)**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* The decedent had executed a will in 1973 which provided for a marital trust for the surviving spouse which was funded with 50 percent of the estate in order to take advantage of the maximum marital deduction available at the time. The will also provided for another trust which had a spendthrift clause. The marital trust was designated as trust A and the non-marital trust was designated as trust B. In 1982, the will was amended to provide for $2 million of assets to pass to the non-marital trust, redesignated as trust A, and the remainder to pass to the marital trust, redesignated as trust B, again in order to take advantage of the unlimited marital deduction and QTIP provisions available at that time. The marital trust was set up to be QTIP. However, the amended will unknowingly retained the spendthrift clause as to trust B, now the marital trust. The IRS claimed that the will provided for application of the spendthrift clause against the marital trust, thus limiting the surviving spouse's rights to the trust income. In addition, the IRS claimed that the will allowed the trustee to pay some expenses from the marital trust. The estate claimed that the application of the spendthrift and expense provisions was inadvertently not changed to reflect the change in designation of the trusts as A and B. The court found that the will was ambiguous in that the IRS interpretation was contrary to will provisions devising all the remaining assets to the marital trust. Therefore, the court held that the spendthrift clause and expense payment provisions did not apply to the marital trust and the entire QTIP trust was eligible for the marital deduction. **Miller v. U.S., 1997 DTR 3d 20, ___ F. Supp. ___ (N.D. Ohio 1996)**.

FEDERAL INCOME TAXATION

NEW FARM INCOME TAX LEGISLATION

Two bills have been introduced in the Congress affecting recent developments in farm income tax. The first bill, H.R. 426, introduced by Rep. Nethercutt with 81 co-sponsors and bipartisan support, repeals the inclusion of income from the sale of farm property (grain, other crops and livestock) from alternative minimum tax for taxpayers using the cash method of tax accounting. The new rule would be effective retroactively to 1986 when the previous rule was enacted. The second bill, H.R. 86, introduced by Rep. Smith of Michigan with 44 co-sponsors and bipartisan support, allows taxpayers with income from a farming business to elect to use two year income averaging for the income from that business. Farming income includes gain from the sale of property (except land) regularly used in the farming business for a substantial period before the sale. For discussion fo the AMT problem see Harl, "Installment Sales of Commodities and AMT," 7 *Agric. L. Dig*. 93 (1996); Harl, "More on Installment Sales of Commodities and AMT," 7 *Agric. L. Dig.* 173 (1996).

ADOPTION EXPENSES. The IRS has provided guidance for claiming the tax credit for individuals and the exclusion from income for employers for costs related to adoptions, as allowed by Sections 23, and 137 of the Small Business Job Protection Act of 1996. **Notice 97-9, I.R.B. 1997-_, __**.

C CORPORATIONS-*ALM* § 7.02.*

REORGANIZATIONS. The IRS has issued proposed regulations providing that for certain reorganizations, transfers by the acquiring corporation of target assets or stock to certain controlled corporations, and under prescribed conditions, transfers of target assets to partnerships, will not disqualify the transaction from satisfying the continuity of interest and continuity of business enterprise requirements. **62 Fed. Reg. 361 (Jan. 3, 1997)**.

CAPITAL ASSETS. The taxpayer was employed full-time as an engineer and devoted 10-20 hours per week investing in the stock market. The stock trades were made through a broker on the taxpayer's account. The court held that the taxpayer's gains and losses from the stock trades were capital gains and losses because the taxpayer was not in the business of trading stocks for others. **Hart v. Comm'r, T.C. Memo. 1997-11**.

COURT AWARDS AND SETTLEMENTS. The IRS has issued rulings under I.R.C. § 104(a)(2) before and after amendment by the Small Business Job Protection Act of 1996. Under the new version of Section 104(a)(2), back pay received in satisfaction of a claim for denial of a promotion due to employment discrimination under Title VII of the 1964 Civil Rights Act is not excludible from gross income except where the back pay is paid for medical care or emotional distress. Under the pre-1996 version of Section 104(a)(2), back pay received in satisfaction of a claim for denial of a promotion due to employment discrimination under Title VII of the 1964 Civil Rights Act is not excludible from gross income except where the amount paid is for emotional distress. Under both versions, the includible amount is wages for purposes of FICA and FUTA. **Rev. Rul. 96-65, I.R.B. 1996-__, __**.

DISCHARGE OF INDEBTEDNESS-*ALM* § 4.02[15].* The IRS has issued proposed regulations that provide ordering rules for the reduction of bases of property under I.R.C. §§ 108, 1017. The regulations will affect taxpayers that exclude discharge of indebtedness from gross income under Section 108. Taxpayers generally must reduce specified tax attributes, including adjusted bases of properties, to the extent income from discharge of indebtedness is excluded from gross income under Section 108. Section 1017 provides rules regarding any basis reductions required by, or elected under, Section 108. The proposed regulations generally retain the "tracing" approach of the existing regulations issued under prior law. Thus, the proposed regulations require a taxpayer to reduce the adjusted basis of the property that secured the discharged indebtedness before reducing the adjusted bases of other property.

The proposed regulations modify the categories in the existing regulations to simplify the process of basis reduction. First, the distinction between purchase-money indebtedness and other secured indebtedness is eliminated. Second, the order of basis reduction for property that secured discharged indebtedness is changed. Thus, the first category of the general ordering rule is real property used in the taxpayer's trade or business or held for the production of income (other than Section 1221(1) real property) that secured the discharged indebtedness, and the

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second category is personal property used in the taxpayer's trade or business or held for the production of income (other than inventory, accounts receivable, and notes receivable) that secured the discharged indebtedness. Therefore, if an indebtedness secured by a building, a parcel of land used in the taxpayer's trade or business, office equipment, and office furniture is discharged, the taxpayer proportionately reduces the adjusted bases of the building and the parcel of land, based upon their relative adjusted bases, to the full extent of the excluded discharge of indebtedness income before reducing the adjusted bases of the office equipment and the office furniture.

The proposed regulations generally provide that a taxpayer may freely choose whether or not to request that a partnership reduce the partner's share of depreciable basis in partnership property and thereby permit the taxpayer to treat the partnership interest as depreciable property (or depreciable real property). In addition, the proposed regulations generally provide that the partnership is free to grant or deny its consent. In order to prevent avoidance of the general ordering rules of the proposed regulations through the use of partnerships, however, a partner is required to request consent if the partner owns (directly or indirectly) more than 50 percent of the capital and profits interests of the partnership, or if the partner receives a distributive share of discharge of indebtedness income from the partnership. In addition, the partnership is required to grant consent if requests are made by partners owning (directly or indirectly) an aggregate of more than 50 percent of the capital and profits interests of the partnership.

The proposed regulations remove Sec. 301.9100-13T, which governed elections under Section 108(b)(5), and add new Prop. Treas. Reg. § 1.108-4. Under the temporary regulations, a taxpayer is required to make the election with the taxpayer's federal income tax return for the taxable year in which the discharge occurs, but is permitted to file an election with an amended return, or claim for credit or refund, if the taxpayer establishes reasonable cause for failing to file the election with the original return. New Prop. Treas. Reg. § 1.108-4 requires the taxpayer to make the election on the timely filed (including extensions) federal income tax return for the taxable year the taxpayer has discharge of indebtedness income that is excluded under Section 108(a). Therefore, a taxpayer that fails to make the election on that return must request the Commissioner's consent to file a late election under Prop. Treas. Reg. § 1.108-4 as depreciable property (or depreciable real property). In addition, the proposed regulations generally provide that the partnership is free to grant or deny its consent. In order to prevent avoidance of the general ordering rules of the proposed regulations through the use of partnerships, however, a partner is required to request consent if the partner owns (directly or indirectly) more than 50 percent of the capital and profits interests of the partnership, or if the partner receives a distributive share of COD income from the partnership. In addition, the partnership is required to grant consent if requests are made by partners owning (directly or indirectly) an aggregate of more than 50 percent of the capital and profits interests of the partnership.

The proposed regulations provide that a partner requesting a reduction in inside basis must make the request before the due date (including extensions) for filing the partner's federal income tax return for the taxable year in which the partner has discharge of indebtedness income. A partnership that consents to a basis reduction must include a consent statement with its Form 1065 and must also provide a copy of that statement to the affected partner on or before the date the Form 1065 is filed. **62 Fed. Reg. 955 (Jan. 7, 1997)**.

IMPUTED INTEREST. I.R.C. § 7672(g) allows for an amount which may be loaned to a qualified continuing care facility without incurring imputed interest. The amount is adjusted annually for inflation and the IRS has announced that the amount for 1997 as $131,300. **Rev. Rul. 96-64, I.R.B. 1996-__**.

IRA. The taxpayer had established an IRA with a credit union. The taxpayer's former spouse obtained a court judgment for arrearages for child support payments and the judgment was executed against the funds in the IRA. The court held that the execution caused the IRA funds to be included in the taxpayer's gross income because (1) the judgment was treated as a distribution to the taxpayer because the execution satisfied a personal obligation of the taxpayer and (2) the taxpayer failed to identify or present evidence that the execution qualified for any exception. The 10 percent penalty for early withdrawal was also assessed. **Vorwald v. Comm'r, T.C. Memo. 1997-15**.

MILEAGE DEDUCTION. The standard mileage rate for 1997 is 31.5 cents per mile for business use, 12 cents per mile for charitable use and 10 cents per mile for medical and moving expense purposes. **Rev. Proc. 96-63, I.R.B. 1996-__**.

PENALTIES. The IRS has issued a revised revenue procedure for identifying circumstances under which the disclosure on a taxpayer's return of a position on an item is adequate for the purpose of reducing the understatement of income tax penalty of I.R.C. § 6662(d) and for the purpose of avoiding the preparer penalty of I.R.C. § 6694(a). **Rev. Proc. 96-58, I.R.B. 1996-50, 4, *revising* Rev. Proc. 95-55, 1995-1 C.B. 457**.

PENSION PLANS. For plans beginning in December 1996, the weighted average is 6.89 percent with the permissible range of 6.20 to 7.44 percent (90 to 109 percent permissable range) and 6.20 to 7.58 percent (90 to 110 percent permissable range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 96-66, I.R.B. 1996-__, __**.

QUALIFIED DEBT INSTRUMENTS. The IRS has announced the 1997 inflation adjusted amounts of debt instruments which qualify for the 9 percent discount rate limitation under I.R.C. §§ 483 and 1274:

Year of Sale or Exchange	1274A(b) Amount	1274A(c)(2)(A) Amount
1997	$3,723,800	$2,659,900

The $3,723,800 figure is the dividing line for 1997 below which (in terms of seller financing) the minimum interest rate is the lesser of 9 percent or the Applicable Federal Rate. Where the amount of seller financing exceeds the

$3,723,800 figure, the imputed rate is 100 percent of the AFR except in cases of sale-leaseback transactions, where the imputed rate is 110 percent of AFR. If the amount of seller financing is $2,659,900 or less (for 1997), both parties may elect to account for the interest under the cash method of accounting. **Rev. Rul. 96-63, I.R.B. 1996-_**.

RETURNS. The taxpayer admitted to receiving nonemployee compensation for 1992 and 1993 but failed to file income tax returns. The taxpayer argued that the federal income tax system was voluntary and did not require the filing of the returns. The taxpayer expressed various tax protester-type arguments such as not being a citizen of the United States but only a citizen of Texas. The taxpayer did agree that if the IRS ruled that the taxpayer was a taxpayer subject to the return requirements, the taxpayer would file amended returns, but the taxpayer refused to voluntarily file the returns. The court upheld the IRS-assessed deficiencies for self-employment and income tax with additions under I.R.C. §§ 6651(a), 6654(a). **Barcroft v. Comm'r, T.C. Memo. 1997-5**.

S CORPORATIONS-*ALM* § 7.02[3][c].*

EXPENSES. The taxpayer was the sole shareholder of a professional S corporation. An employee of the corporation was found to have embezzled funds from a client of the corporation. The client sued the employee, the employee's estate after the employee died and the corporation. The parties reached an agreement that the corporation would pay the claim if the corporation was adjudicated to be a beneficiary of a life insurance policy on the life of the decedent employee. The corporation did make the payment and claimed the payment as a business expense deduction. The IRS argued that the deduction was not allowed because the corporation did not include the embezzled funds in its income. The court held that the embezzlement was an action personal to the employee and not charged to the corporation; therefore, the embezzled funds would not be included in the corporation's income. The IRS also argued that the payment was not an ordinary and necessary expense of the corporation's business. The court held that the employee's actions were part of the employee's services for the corporation; therefore, the claim against the corporation arose out of the corporation's business and was deductible as an ordinary and necessary business expense. The court found that the corporation made the payment to protect its business reputation and credit status. **Musgrave v. Comm'r, T.C. Memo. 1997-19**.

SHAREHOLDERS. The IRS has issued guidance for making the election under Section 1302 of the Small Business Protection of 1996, Pub. l. No. 104-188, 110 Stat. 1755, which allows an electing small business trust (ESBT) to be a shareholder in an S corporation. The ESBT trustee must make the election by filing with the same IRS service center as used by the S corporation a statement--

(1) containing the names, addresses, and taxpayer identification number of all current potential beneficiaries, the trust and the corporation;

(2) identifying the election under I.R.C. § 1361(e)(3);

(3) specifying the effective date of the election but not earlier than two months and fifteen days after the filing;

(4) identifying the date stock was transferred t the trust;

(5) providing information demonstrating that all trust beneficiaries are eligible shareholders and that the trust meets the definitional requirements of I.R.C. § 1361(e). **Notice 97-12, I.R.B. 1997-_, __**.

SOCIAL SECURITY TAXES. The IRS has issued procedures for obtaining automatic extensions of time for (1) furnishing Form W-2, Wage and Tax Statement, to employees, and (2) filing Form W-2 with the Social Security Administration. The automatic extensions also apply to Form 499R-2/W-2PR, Form W-2VI, Form W-2GU, and Form W-2AS. **Rev. Proc. 96-57, I.R.B. 1996-__**.

The IRS has issued a revised revenue procedure explaining the standard and alternative procedures for preparing and filing Form W-2, Wage and Tax Statement; Form W-3, Transmittal of Income and Tax Statements; Form 941, Employer's Quarterly Federal Tax Return; Form W-4, Employee's Withholding Allowance Certificate; and Form W-5, Earned Income Credit Advance Payment Certificate. **Rev. Proc. 96-60, I.R.B. 1996-__, revising Rev. Proc. 84-77, 1984-2 C.B. 753**.

TRAVEL EXPENSES. The IRS has issued updated procedures for determining the amount of travel expense which will be deemed substantiated where a per diem allowance is made under a reimbursement or other expense allowance arrangement. The updated procedures also provide an optional method for employees and self-employed individuals for computing the deductible costs of business meal and incidental expenses incurred while traveling away from home. The new procedures are effective April 1, 1996. **Rev. Proc. 96-64, I.R.B. 1996-__, *revising* Rev. Proc. 96-28, 1996-1 C.B. 686**.

LANDLORD AND TENANT

CONSERVATION RESERVE PAYMENTS. The parties entered into a three year cash lease for farm land at $20,000 annual rent. The lease allowed the tenant the option to extend the lease for two years. In the second year the parties agreed to enroll the land in the federal conservation reserve program (CRP) with the bid for the rental chosen so that the landlord's portion of the CRP rent payments would approximate the $20,000 annual rent under the lease. Almost all of the acres were accepted into the CRP and the tenant paid the balance of the annual rent not covered by the CRP payments. The tenant exercised the option to extend the lease but the landlord claimed that the tenant owed the annual $20,000 rent in addition to the CRP payments. The tenant continued to possess the land after the lease extension period and complied with the CRP contracts. The landlord received the CRP payments and the tenant attempted to pay the deficit of those payments under the $20,000 annual rent. The tenant argued that the CRP contract amended the lease to increase the lease term to match the CRP contract term, with the tenant liable only for the amount by which the CRP payments to the landlord fell short of the $20,000 rent. The court found that the parties had orally amended the lease to allow for payment of most of the annual rent from the landlord's share of the CRP payments. The court held that the CRP contract did not affect the lease, but the lease was amended by the oral

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agreement and the oral agreement terms continued in effect during the time the tenant remained in possession after the termination of the written lease term. The key elements here were that the parties orally agreed to use of the CRP payments for the rent, the tenants continued to comply with the lease and CRP contract, and the landlord accepted the CRP payments. **Eagle Watch Investments, Inc. v. Smith, 924 P.2d 257 (Mont. 1996)**.

TERMINATION. A farm was owned by a parent who entered into a 15 year written lease with one child. The lease was recorded and required the filing of annual reports by the tenant. The parent soon thereafter executed a quitclaim deed of title to the farm to another child, reserving a life estate in the parent and making the deed subject to the existing lease to the other child. The parent died and the title holder attempted to terminate the lease, arguing that the death of the parent changed the lease to a tenancy at will because the parent could not transfer more than a life estate interest under the lease. The court found, however, that the lease was created first, when the parent still owned title in fee; therefore, the lease could extend past any life estate created later. The title holder also argued that the lease terms were breached because the tenant failed to file an annual report. The court held that the breach was not material in that the tenant kept adequate records and in fact transferred the crop share portion to the landlord each year. **Mann v. Mann, 671 N.E.2d 73 (Ill. Ct. App. 1996)**.

PROPERTY

BOUNDARIES. This case involved a dispute as to whether the defendant cut down trees on the plaintiff's property. The property of both parties was originally owned by one person, the plaintiff's sister who was the defendant's mother. The previous owner had conveyed the plaintiff's portion to the plaintiff's brother and the deed recognized that a stone wall was the boundary of the conveyed parcel. The previous owner never farmed on the other side of the wall and had made some gravel test drillings near the wall but never on the plaintiff's side. The defendant's portion was approximately the number of acres listed on the deed from the previous owner but the defendant tried to do some farming on the plaintiff's side of the wall and had some trees harvested on the plaintiff's side of the wall. The court held that there was sufficient evidence that the previous owner had intended to convey all of the property up to the wall and treated that parcel as belonging to the plaintiff. Thus, the court held that the stone wall was the actual boundary between the properties. **Koennicke v. Maiorano, 682 A.2d 1046 (Conn. Ct. Ap. 1996)**.

WATER RIGHTS

NONTRIBUTORY RIGHTS. The plaintiff sold 900 acres of land to third parties who eventually sold the land to the defendant. The initial sale was secured by a deed of trust but neither the sale agreement not the trust mentioned anything about water rights. After the initial sale but before the subsequent sales, the new owner had the nontributory water rights adjudicated. The subsequent sales provided that the buyers assumed a portion of the original note given for the first purchase of the land. The plaintiff brought this action for foreclosure and argued that the foreclosure included the nontributory water rights. The court held that the water rights were included in the foreclosure because the water rights were directly tied to the land ownership. The court held that the water rights existed prior to the water rights adjudication, again because the water rights were connected to the land. The court also held that the deed of trust included the water rights as security. **Bayou Land Co. v. Talley, 924 P.2d 136 (Colo. 1966)**.

ZONING

NONCONFORMING USE. The petitioners had applied for a permit to construct a nonfarm building, a residence, on land zoned as exclusive farm use (EFU). The county zoning board approved the permit but the Land Use Board of Appeals (LUBA) reversed and remanded. The county had based its approval on two grounds—(1) the petitioners had maintained a mobile home on the spot since before the zoning change and (2) the nonfarm building would be located on one acre of land which was not suitable for farming. The petitioner had also argued that the dwelling would be used in conjunction with the petitioners' horse boarding business on neighboring property; therefore, the acre building site was not unsuitable for farming. The petitioners claimed that the boarding of horses qualified as the production of livestock. The county board ruled against the petitioners on this issue. The LUBA reversed on both reasons. The court ruled on only the nonconforming use issue. The LUBA had ruled that, because the boarding of horses involved grazing and grazing was a normal part of raising horses, the petitioners use of the land was not a nonconforming use. The court held that grazing alone was insufficient evidence of production of livestock and remanded the case to LUBA for a decision based on that rule. **Moore v. Coos County, 925 P.2d 929 (Or. Ct. App. 1996)**.

CITATION UPDATES

Coohey v. United States, 97-1 U.S. Tax Cas. (CCH) ¶ 50,113 (N.D. Iowa 1996) (deferred payment contracts) see article by N. Harl, Vol. 7, p. 183.

Delaney v. Comm'r, 99 F.3d 20 (1st Cir. 1996) (court awards and settlements) see Vol. 7, p. 185.

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