buildings, fences and feeding floors, the item may have been depreciated out and has no basis.

It is suggested that any reduction in income tax basis required can be accomplished by reducing the basis of any assets used in the trade or business. This would allow reduction of the basis to the land rather than triggering more income tax liability for an already financially troubled taxpayer and would be in keeping with the relief character of the statute (I.R.C. § 108(e)(5)).

12. The low farm prices are certain to lead to farm and ranch bankruptcies. Several suggestions are made to facilitate the bankruptcy and debt restructuring processes—

a. Chapter 12 bankruptcy is scheduled to sunset on September 30, 1998. Legislation is pending to make the provision permanent.

It is strongly suggested that Chapter 12 bankruptcy be made permanent before October 1, 1998.

b. The Bankruptcy Tax Act of 1980 was never amended to add chapter 12 bankruptcy to the chapters (7 and 11) for which a new tax entity is created on filing. Accordingly, taxpayers in chapter 12 bankruptcy do not have the same planning opportunities as are available to chapter 7 and 11 filers. This is especially important to farm and ranch taxpayers because of the substantial amount of gain typically involved in financially troubled farm and ranch businesses.

It is suggested that I.R.C. § 1398 be amended to add chapter 12 to the chapters for which a new tax entity is created upon bankruptcy filing.

c.Abandoned property in bankruptcy has posed a serious obstacle to a "fresh start" which is one of the two major objectives of bankruptcy in this country. The problem is that when assets are abandoned to the debtor (where the property is worth less than what is owed on it) under 11 U.S.C. § 554, two Courts of Appeal have held that the debtor rather than the bankruptcy estate bears the income tax liability.

It is suggested that legislation be enacted which would require the gain on abandoned property to be taxed to the bankruptcy estate. This has impacted adversely farm and ranch firms in particular because of zero income tax basis on many assets.

13. The family-owned business deduction, enacted as an exclusion in 1997 and converted to a deduction in 1998 legislation, was badly flawed as originally enacted. The 1998 amendments addressed serious problems with pre-death and post-death cash renting but several problems remain which must be addressed in order for the concept to be fully workable.

a. The provision requires that assets, to be eligible for the deduction, must have been owned for five of the last eight years before death. That is a serious problem for crops, raised livestock and even machinery.

Language has been provided to the Senate Finance Committee and Joint Committee on Taxation in 1998 specifying that the holding period would not apply to inventory or inventory-like property or to depreciable assets used in the business. It is urged that this amendment be enacted.

b. The FOBD statute as originally enacted made no provision for post-death disposition of assets during the recapture period. Accordingly, any sale of crops or livestock would lead to recapture. When this problem was called to the attention of the conference committee in late July, 1997, a paragraph was added to the conference committee report indicating that recapture should not occur upon sale or exchange of such assets as grain or machinery in the course of business. However, it was too late to add a provision to the statute. Efforts to amend the statute in 1998 were unsuccessful.

It is suggested that legislation be enacted providing that post-death dispositions in the course of business not cause recapture. An even better solution would be to adopt the I.R.C. § 6166 approach which allows up to 50 percent of the assets to be transferred without accelerating the deferred tax.

c. At present, interest begins to run in the event of recapture on the date the federal estate tax was due, not on the date of the recapture event. This is a punitive provision.

It is suggested that the provision be amended to specify that interest would begin on the date of the recapture event. This would conform the provision to the recapture treatment under special use valuation (I.R.C. § 2032A).

14. Since 1986, when the last amendment was made to I.R.C. § 464 on prepaid farm expenses, farmers and ranchers have been allowed to deduct on a prepurchased basis a maximum of 50 percent of total deductible farming expenses not counting the prepaid expenses. Two exceptions were provided for "qualified farm-related taxpayers," one of which is for "extra ordinary circumstances."

It is suggested that Congress specify that the 1996 farm bill be deemed such an "extra ordinary circumstance" because of the increased expenditures under the 1996 legislation since land is no longer idled.

15. A problem of some significance under special use valuation (and under the family-owned business deduction) is that there is no authority on post-death mortgaging of assets as to whether post-death mortgaging would constitute a recapture event.

It is suggested that an amendment be enacted for both I.R.C. § 2032A and I.R.C. § 2057 providing that post-death borrowing using assets subject to the respective elections is not a recapture event so long as the resulting funds are used in the business or for the purchase of assets used in the business.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

FEDERAL TAXATION-*ALM* § 13.03[7].*

EARNED INCOME TAX CREDIT. The taxpayer filed for Chapter 7 on October 20, 1997. The taxpayer listed on Schedule B an Earned Income Tax Credit (EIC) for the 1997 tax year. The taxpayer argued that the EIC was not property of the estate since it was neither a legal nor an equitable interest of the taxpayer as of the commencement of the case. The court held that an EIC was property of the bankruptcy estate, even when the case is filed before the end of the tax year for which the EIC was claimed. ***In re* Johnston, 98-2 U.S. Tax Cas. (CCH) ¶ 50,625 (Bankr. 6th Cir. 1998)**.

FEDERAL ESTATE AND GIFT TAX

FAMILY-OWNED BUSINESS DEDUCTION-*ALM* § 5.04[7].* A bill has been introduced in the U.S. House of Representatives which would remove the family-owned business deduction limitation for sole proprietorships and entities owned entirely by the decedent and members of the decedent's family. A business or entity eligible for the unlimited deduction must have an annual reinvestment amount not less than the annual adjusted net earnings. The reinvestment amount equals (1) the increase during the taxable year in net asset investment in the same trade or business, plus (2) the increase during the taxable year in working capital of the same trade or business. "The increase during the taxable year in net asset investment is an amount equal to the excess (if any) of (I) the net asset investment as of the close of the taxable year, over (II) the net asset investment as of the close of the preceding taxable year. The term 'net asset investment' means the excess (if any) of (I) the aggregate adjusted bases of qualified assets held by the taxpayer for use in the active conduct of a trade or business, over (II) the aggregate outstanding amount of indebtedness of the taxpayer which was incurred to acquire or improve qualified assets so held." The term "adjusted net earnings" means taxable income "(i) increased by the sum of (I) the amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax, and (II) the amount allowed for depreciation or amortization, and (ii) decreased by the tax imposed by chapter 1 for the taxable year." **H.R. 4521**.

GIFT. The taxpayer released a contingent reversionary interest in a GRIT in 1989 based upon the taxpayer's reasonable belief, following the advice of counsel, that I.R.C. § 2036(c) would exact greater tax consequences against the taxpayer's estate if the taxpayer did not make the release. Congress retroactively repealed, *nunc pro tunc,* Section 2036(c), rendering that proviso and its implementing IRS Notice null and void, as if it had never existed. The court held that the taxpayer could claim a refund of gift taxes paid on the original release of the contingent reversionary interest. **Neal v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 60,318 (W.D. Penn. 1998)**.

GROSS ESTATE. The decedent had owned stock with the decedent's predeceased spouse as tenants by the entirety. The stock was received when the corporation, owned in part by the spouse, transferred the stock to the decedent's spouse and the decedent who took ownership with the decedent as tenants by the entirety. In October 1986, the decedent and spouse transferred $140,000 of stock to their two children for life with remainders to their grandchildren. The decedent and spouse elected to treat the gift as a split gift with each claiming a gift of $70,000 less two $10,000 exclusions. The spouse died within three years after the gift and the estate included the taxable gift of $50,000 in the gross estate. Under I.R.C. § 2001(e), if a joint gift was entirely includible in the spouse's estate under I.R.C. § 2035, then none of the gift was included in the decedent's estate. The court held that the gift was not included in the spouse's estate under I.R.C. § 2035 but was included in the spouse's estate under I.R.C. § 2001(b) as a taxable gift. The estate argued that, because the decedent received the stock for no consideration, the full amount of the gifted stock should have been included in the spouse's gross estate under I.R.C. § 2040. The court held that I.R.C. § 2040 did not apply because the gifted stock was not owned by the spouse and decedent at the time of the spouse's death. The court acknowledged that, under I.R.C. § 2035(a), property transferred within three years of death is treated as owned by the decedent; however, the court held that I.R.C. § 2035 did not apply because the stock was included in the spouse's estate by virtue of I.R.C. § 2001(b). The appellate court affirmed in a case designated as not for publication. **Estate of Greco v. Comm'r, 98-2 U.S. Tax Cas. (CCH) ¶ 60,319 (4th Cir. 1998), *aff'g*, T.C. Memo. 1996-373**.

MARITAL DEDUCTION-*ALM* § 5.04[3].* At the time Treas. Reg. § 20.2056(b)-7(d)(3) was promulgated, the position contained in the regulation was the subject of litigation in a number of cases and had been rejected by two circuit courts in *Estate of Clayton v. Comm'r, 976 F.2d 1486 (5th Cir. 1992), rev'g 97 T.C. 327 (1991), and Estate of Robertson v. Comm'r, 15 F.3d 779 (8th Cir. 1994), rev'g 98 T.C. 678 (1992)*. Since that time, *Estate of Spencer v. Comm'r, 43 F.3d 226 (6th Cir. 1995), rev'g T.C. Memo. 1992-579*, also rejecting the IRS position, has been decided. Additionally, in *Estate of Clack v. Comm'r, 106 T.C. 131 (1996)*, the Tax Court reversed the position it had taken previously in *Estate of Clayton, Estate of Robertson, and Estate of Spencer*. The IRS has adopted as final amendments to the regulations in accordance with the circuit courts' decisions in *Estate of Clayton*, *Estate of Robertson*, and *Estate of Spencer*, and the Tax Court's decision in *Estate of Clack*. The amendment adds Treas. Reg. § 20.2056(b)-7T(d)(3)(ii), which states that an income interest (or life estate) that is contingent upon the executor's election under section 2056(b)(7)(B)(v) will not be precluded, on that basis, from qualification as a "qualifying income interest for life" within the meaning of I.R.C. § 2056(b)(7)(B)(ii). The final amendments included a provision that an interest in property is eligible for treatment as qualified terminable interest property if the income interest is contingent upon the executor's election and if that portion of the property for which no election is made will pass to or for the benefit of beneficiaries other than the surviving spouse. In accordance with the addition of Treas. Reg. § 20.2056(b)-7T(d)(3)(ii), Treas. Reg. § 20.2056(b)-7T(h), Example 6(ii) and Treas. Reg. § 20.2044-1T Example 8 were also added. **63 Fed. Reg. 44391 (Aug. 19, 1998)**.

The decedent had created two trusts. The first trust had two shares, one for marital deduction property sufficient to reduce the federal estate tax to zero and one for other property. A second trust passed entirely to the surviving spouse. The decedent's will provided for payment of death taxes from the residue of the estate before payment from the property in the trusts. The decedent's estate had no residuary property and the death taxes were paid from insurance proceeds in the second trust. Under California law, taxes owed by an estate are prorated to each beneficiary unless the decedent elects not to have the proration provision apply. The IRS argued that the election out of the proration statute was made; therefore, the property passing to the marital deduction trust, and the size of the marital deduction, were reduced by the trust's share of estate taxes. The court held that the integrated estate plan evidenced by the decedent's formation of the trusts and the will demonstrated that the decedent intended the estate taxes to be paid by either the residuary estate or the second trust, in order to maximize the effect of the marital deduction from passing of property to the marital trust. **McKeon v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 60,317 (9th Cir. 1998)**.

TRUSTS. The taxpayer was a beneficiary of a testamentary trust. The trust was funded with stock, and the trustee borrowed

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funds on margin from a brokerage account and loaned the money to the decedent's estate and corporations owned by the estate. The loans were not evidenced by repayment schedules, fixed maturity dates or notes but the loans were ratified by the estate representatives and the boards of directors of the corporations. The estate did not have any distributable net income (DNI) for the tax years involved but paid the trust interest on the loans. The taxpayer argued that because the estate had no DNI, the trust did not have any DNI from the interest payments. The Tax Court held that the taxpayer had to include distributions from the trust in gross income because the interest payments were DNI to the trust. The appellate court reversed, holding that no debt existed between the trust and estate; therefore, the payments were not taxable interest to the trust. Because the estate had no DNI, no DNI was passed on to the trust in the payments. **Geftman v. Comm'r, 98-2 U.S. Tax Cas. (CCH) ¶ 50,630 (3d Cir. 1998), *rev'g*, T.C. Memo. 1996-447**.

FEDERAL INCOME TAXATION

CORPORATIONS-*ALM* § 7.02.*

CONSTRUCTIVE DIVIDENDS. The taxpayer owned rural land and leased a portion of the land to a corporation owned by the taxpayer. The corporation built a building on the land which involved an open first floor with no facilities and a second floor which contained four bedrooms and four full bathrooms. The taxpayer and family lived in the second floor area. The rent paid by the corporation exceeded the fair market rental for the property and was not paid by the corporation. The lease also required the corporation to pay all taxes associated with the leased property but the taxpayer personally made these payments. The corporation maintained a separate site which was used for business operations. The court held that the corporation's rent and construction payments were constructive distributions to the taxpayer. In a second hearing on the tax character of the constructive distributions, the taxpayer argued that some of the distributions were not taxable as return of the taxpayer's basis in a loan to the corporation. The court held that I.R.C. § 301 had no provision for reduction of the basis of corporate debt. The court noted that the original holding did not include any finding of a debt to the corporation. See also *Spera v. Comm'r, T.C. Memo. 1998-225*. **Spera v. Comm'r, T.C. Memo. 1998-299**.

STOCK REDEMPTION. This ruling involved Class B stock issued by a regional Farm Credit Bank (Bank). The Class B stock was stock required to be owned by member borrowers. Some members became concerned that the Bank's program of rebating interest on loans through transfer of additional Class B stock to member borrowers increased the cost of their loans as compared to other members with fewer or smaller loans. The Bank entered into an agreement to redeem some of the Class B stock to make the loan costs more equitable among the members. An auditing agent argued that the effect of the transaction was the same as if the Bank redeemed all of its Class B stock and the members immediately loaned the proceeds back to the Bank which then paid interest on such proceeds by means of the interest rebate program. This would have the effect of converting the Class B stock to debt. The IRS ruled that the stock would not be treated as debt because it had no indicia of debt, such as a maturity date, priority to liquidation proceeds, and right to demand repayment. **FSA 1993-0803-1**.

COURT AWARDS AND SETTLEMENTS. The taxpayer participated in an early retirement program provided by the taxpayer's employer. In exchange for various payments and benefits, the taxpayer signed a release form which released the employer from all claims that the taxpayer had against the employer arising from employment or the termination of employment. The taxpayer did not negotiate the terms of the program and received no payments or benefits not offered to other participants. The taxpayer argued that a portion of the payments were received for personal injuries but did not identify the personal injuries. The court found that the payments were made according to the general early retirement program and not according to any claim of personal injury made by the taxpayer; therefore, the payments were included in the taxpayer's gross income. **Aschkenasy v. Comm'r, 98-2 U.S. Tax Cas. (CCH) ¶ 50,634 (S.D. N.Y. 1998)**.

The taxpayers were in a class of plaintiffs who alleged that their employer interfered with the attainment of members' pension rights in violation of Section 510 of ERISA, 29 U.S.C. §1140, by laying them off before those rights vested in order to reduce its projected pension liabilities. Partial summary judgment on liability was granted in favor of the class, and a special master was appointed to assist in the settlement of damages issues or to recommend a procedure to expedite their resolution. Although the special master did not have the authority to determine the ultimate tax consequences of the settlement award, he described the award as compensation for mental anguish, dignitary harm, and loss in earnings capacity. The court noted that two other cases involving this class action have split on the inclusion of the settlement in gross income. See *Dotson v. United States, 87 F.3d 682 (5th Cir. 1996)* and *Hemelt v. United States, 122 F.3d 204 (4th Cir. 1997).* The court held that the settlement payments were wages subject to FICA and income tax. **Mayberry v. United States, 98-2 U.S. Tax Cas. (CCH) ¶ 50,632 (8th Cir. 1998)**.

DISCHARGE OF INDEBTEDNESS-*ALM* § 4.02[15].* The taxpayer sold oil, gas, and mineral leases and the operating rights, mineral interests, royalty interests, overriding royalty interests, payments out of production and interests in or under certain unit agreements. The sale was made under a purchase agreement in exchange for cash, a production payment and a promissory note. The production payment was payable solely out of a certain percentage of the production from the properties, terminated when a certain percentage of the reserves, as estimated at the time of sale, had been produced, and had an economic life of shorter duration than the economic life of the burdened properties. The production payment and the recourse note are secured by a mortgage under which the property interests are pledged as collateral. Under Treas. Reg. § 1.636-1(a)(3), the production payment was properly characterized as a purchase money mortgage loan. Under the agreement the taxpayer reserved a repurchase option with respect to all or any undivided portion of the leases or any individual lease. The Agreement specifies that the repurchase price is the calculated fair market value (determined by an annual engineering report) of the property being reacquired with certain adjustments. The taxpayer exercised its right under the agreement to repurchase an undivided 30 percent of the property interests in exchange for a cash payment and a partial release of the buyer's indebtedness represented by the production payment. The IRS ruled that the discharge of indebtedness income was governed by I.R.C. § 1038. **Ltr. Rul. 9833005, May 12, 1998**.

GROSS INCOME. The taxpayer won $10 million in a lottery and sought tax advice from an attorney. The attorney failed to advise the taxpayer to pay state taxes in the year of the lottery payment and the taxpayer paid more federal taxes than if the state taxes were paid in that year. The taxpayer sought compensation from the attorney and sought advice as to whether the compensation would be included in gross income. The IRS cited *Clark v. Comm'r, 40 B.T.A. 333 (1939)* and *Rev. Rul. 57-47, 1957-1 C.B. 23* which both ruled that reimbursements for excess tax payments caused by tax return preparation errors were not included in gross income. However, the IRS ruled in this case that no filing error occurred and no incorrect tax was paid, based on the actual circumstances; therefore, any reimbursement would be included in gross income. Thus, if the taxpayer had paid the state tax but the deduction for the state tax was not properly taken, a reimbursement for the excess tax paid would be excluded from income. **Ltr. Rul. 9833007, May 13, 1998**.

HOBBY LOSSES-*ALM* § 4.05[1].* The taxpayers, husband and wife operated two businesses, a dental practice and an apple orchard. The taxpayers operated the dental practice and the orchard as a partnership. The taxpayers combined the income and expenses of both activities on one partnership return. In most tax years the dental practice was reported on Schedule C and the orchard on Schedule F, but in one tax year, both activities were reported on Schedule F. The taxpayers claimed that the activities were related in that the taxpayers recommended that their patients eat apples and gave or sold apples to the clients. The court held that the dental practice was not sufficiently related to the orchard activity to allow the activities to be combined as one business for income tax purposes. The court also held that the orchard activity was not engaged in for profit, based on the following factors: (1) the taxpayers did not keep accurate and full production records; (2) the taxpayers kept only a "canceled check" record of business transactions; (3) the only changes to the orchard operation were made to decrease the work load of the taxpayers and not to make the activity more profitable; (4) the taxpayers had little experience or expertise in growing apples and did not seek sufficient expert assistance; (5) the taxpayers did not spend sufficient amount of time on the activity to fully harvest the apples; (6) the orchard had never produced a profit; and (7) the taxpayers had substantial income from the dental practice which was offset by the losses from the orchard activity. The court denied deductions related to the orchard activity in excess of the income from the activity. **Zdun v. Comm'r, T.C. Memo. 1998-296**.

The taxpayers, husband and wife maintained Arabian horses for breeding, raising and racing. The court held that the horse operation was not operated for profit based on the following factors: (1) the taxpayers did not keep full and accurate records of the horse activity, a separate bank account or a plan to make the operation profitable; (2) the taxpayers had little expertise in the business of horse raising or racing and did not seek expert help; (3) the husband was involved full time in the activity but the wife was fully employed elsewhere; (4) the horses did not appreciate in value from the taxpayers' activities; (5) the activity never reported a profit and had little revenue generated by the racing; (6) the wife had substantial income from other employment which was offset by the horse activity losses; and (7) the taxpayer derived substantial personal pleasure from the activity. **Surridge v. Comm'r, T.C. Memo. 1998-304**.

SAFE HARBOR INTEREST RATES

August 1998

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	5.48	5.41	5.37	5.35
110% AFR	6.04	5.95	5.91	5.88
120% AFR	6.60	6.49	6.44	6.40
Mid-term				
AFR	5.57	5.49	5.45	5.43
110% AFR	6.13	6.04	6.00	5.97
120% AFR	6.70	6.59	6.54	6.50
Long-term				
AFR	5.72	5.64	5.60	5.57
110% AFR	6.30	6.20	6.15	6.12
120% AFR	6.88	6.77	6.71	6.68

September 1998

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	5.42	5.35	5.31	5.29
110% AFR	5.98	5.89	5.85	5.82
120% AFR	6.52	6.42	6.37	6.34
Mid-term				
AFR	5.54	5.47	5.43	5.41
110% AFR	6.11	6.02	5.98	5.95
120% AFR	6.67	6.56	6.51	6.47
Long-term				
AFR	5.74	5.66	5.62	5.59
110% AFR	6.33	6.23	6.18	6.15
120% AFR	6.91	6.79	6.73	6.70

S CORPORATIONS-*ALM* § 7.02[3][c].*

SHAREHOLDER'S SHARE. The IRS has issued proposed regulations governing the determination of an S corporation's shareholder's share of pass-through items. In the case of most items that must be separately stated by an S corporation, the provisions by which an S corporation accounts to its shareholders for tax purposes under I.R.C. § 1366 closely parallel the provisions for a partnership accounting to its partners under I.R.C. § 702. The proposed regulations provide rules outlining this general pass-through scheme for S corporations to their shareholders.

The proposed regulations define tax-exempt income as income that is permanently excludible from the gross income of an S corporation and its shareholders in all circumstances in which the relevant I.R.C. section applies. For example, tax-exempt income includes proceeds of life insurance contracts that are payable by reason of an individual's death and that are excludible from gross income under I.R.C. § 101, and interest on state and local bonds that is excludible from gross income under I.R.C. § 103. However, income that is excludible from gross income pursuant to a provision of the I.R.C. that might have the effect of deferring income to the S corporation or its shareholders is not tax-exempt income. For example, income from the discharge of indebtedness that is excludible from gross income under I.R.C. § 108 does not constitute tax-exempt income because the attribute reduction provisions of I.R.C. § 108(b) have the effect of deferring the recognition of such income in some circumstances while permanently excluding it, in whole or in part, in other circumstances. See *Nelson v. Comm'r, 110 T.C. 114 (1998)*. **Prop. Treas. Reg. § 1.1366-1(a)(2)(vii)**.

Consistent with the adoption of parallel operational rules between I.R.C. §§ 702 and 1366, the items of an S corporation are generally characterized in the same manner that partnership items are characterized. The partnership rules provide that the character of a partnership item reported by a partner is generally determined at the entity level under a conduit rule. The proposed regulations provide a similar conduit rule under which the character of a corporate item that is passed through to and reported by a shareholder is generally determined at the corporate level. However, exceptions to the general rule apply for contributions of either noncapital gain property or capital loss property if an S corporation is formed or availed of by any shareholder or shareholders for a principal purpose of selling or exchanging the property to alter the character of the gain or loss. The character of the gain or loss will be the same as it would have been if the property were in the hands of the shareholder or shareholders at the time of the sale or exchange. **Prop. Treas. Reg. § 1.1366-1(b)**.

In general, I.R.C. § 1366(d)(1) and the proposed regulations provide that the amount of losses and deductions taken into account by a shareholder for any taxable year may not exceed the sum of the shareholder's adjusted bases in the stock of the S corporation and in any indebtedness of the S corporation to the shareholder. Moreover, any loss or deduction for the taxable year not taken into account by a shareholder by reason of the basis limitation rule is treated under I.R.C. § 1366(d)(2) and the proposed regulations as incurred by the corporation with respect to that shareholder in the corporation's first succeeding taxable year, and subsequent taxable years. For purposes of the basis limitation rule in I.R.C. § 1366(d), the basis of stock acquired by gift is the basis of the stock for determining loss under I.R.C. § 1015. The basis rules under I.R.C. § 1015 operate to minimize the loss recognized by a donee upon the sale or exchange of the loss stock acquired by gift. Therefore, the basis limitation rule limits a donee shareholder's pass-through items of loss or deduction to the basis used for determining loss upon the sale or exchange of the stock acquired by gift. **Prop. Treas. Reg. § 1.1366-2(a)**.

The proposed regulations provide that if a shareholder's aggregate pro rata share of the items of loss and deduction exceeds the sum of the shareholder's adjusted bases in stock and debt, the limitation on losses and deductions must be allocated among the shareholder's pro rata share of each loss or deduction. This allocation is determined by taking the proportion that each loss or deduction bears to the total of all losses and deductions, including those previously disallowed. **Prop. Treas. Reg. § 1.1366-2(a)**.

Also under the proposed regulations, a shareholder's disallowed losses and deductions are personal to that shareholder and cannot be transferred. Moreover, if a shareholder transfers all of the shareholder's stock in an S corporation, any disallowed loss or deduction is permanently disallowed. **Prop. Treas. Reg. § 1.1366-2(a)(5)**.

The proposed regulations provide special rules for a shareholder to carry over disallowed losses and deductions to any post-termination transition period. Those rules generally follow the limitation rules provided in the proposed regulations for years in which the S corporation election is in effect, except that the amount of losses and deductions that may be taken into account is limited to the adjusted basis of the shareholder's stock (rather than stock and debt) in the corporation determined at the close of the post-termination transition period. See I.R.C. § 1366(d)(3)(B). **Prop. Treas. Reg. § 1.1366-2(a)(2)**.

The proposed regulations provide rules regarding the carryover of disallowed losses and deductions in the event of certain corporate reorganizations. If a corporation acquires, in a transaction to which I.R.C. § 381(a) applies, the assets of another S corporation for which disallowed losses and deductions would carry over with respect to a shareholder under I.R.C. § 1366(d)(2), except for the reorganization, the losses and deductions will be available to that shareholder. Where the acquiring corporation is an S corporation, the losses and deductions will be treated as incurred by the acquiring S corporation with respect to that shareholder. Where the acquiring corporation is a C corporation, the proposed regulations provide special rules for a shareholder to carry over disallowed losses and deductions to any post-termination transition period under I.R.C. § 1377 if the shareholder is a shareholder of the C corporation after the transaction. In the case of an S corporation that transfers a part of its assets constituting an active trade or business to another corporation in a transaction to which I.R.C. § 368(a)(1)(D) applies, and immediately thereafter the stock and securities of the controlled corporation are distributed in a distribution or exchange to which I.R.C. § 355 (or so much of I.R.C. § 356 as relates to I.R.C. § 355) applies, any disallowed loss or deduction with respect to a shareholder of the distributing corporation immediately before the transaction is allocated between the distributing corporation and the controlled corporation with respect to the shareholder. This allocation is made in proportion to the fair market value of the shareholder's stock of the distributing corporation and the shareholder's stock of the controlled corporation, determined immediately after the transaction. **Prop. Treas. Reg. § 1.1366-2(c)**.

In general, the proposed regulations provide for the reallocation of items of the corporation among family members under certain conditions. I.R.C. § 1366(e) requires a determination of whether an individual family member who renders services for or provides capital to the S corporation has received reasonable compensation. The proposed regulations provide that in determining a reasonable allowance for services rendered for, or capital furnished to, the S corporation, all the facts and circumstances are considered, including the amount that ordinarily would be paid in order to obtain comparable services or capital from a person who is neither a member of that family nor a shareholder in the corporation. **Prop. Treas. Reg. § 1.1366-3**.

For purposes of I.R.C. § 1366(e), similar rules apply to services rendered, or capital furnished, to an S corporation by a pass-through entity in which a member of a shareholder's family holds an interest. The proposed regulations provide that if the pass-through entity does not receive reasonable compensation for the services rendered or capital furnished, the Commissioner may prescribe adjustments to the pass-through entity and the corporation as necessary to reflect the value of the services rendered or capital furnished. I.R.C. § 1366(f) and the proposed regulations provide special rules limiting the pass through of certain items of an S corporation to its shareholders. I.R.C. § 1366(f)(1) and the proposed regulations provide that the pass-through rules under I.R.C. § 1366(a) are inapplicable with respect to any credit allowable under I.R.C. § 34 (relating to certain uses of gasoline and special fuels). In addition, I.R.C. § 1366(f)(2) and (3) and the proposed regulations provide for a reduction in the pass through of items for tax imposed on an S corporation under I.R.C. §§ 1374 or 1375. **Prop. Treas. Reg. § 1.1366-4**.

Section 1309 of TRA 1996 amended I.R.C. § 1368 to require that in the case of any distribution made during any taxable year, the adjusted basis of the stock is determined with regard to the adjustments provided in I.R.C. § 1367(a)(1) for the taxable year. Thus, the adjustments for distributions made by the S corporation

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during the taxable year are taken into account before applying the loss limitation for the year.

The proposed regulations provide that for taxable years of the corporation beginning on or after August 18, 1998, adjustments to the basis of a share of stock are made in the following order: (1) increases for income items and the excess of deductions for depletion over the basis of the property subject to depletion; (2) decreases for distributions; (3) decreases for noncapital, nondeductible expenses, and certain oil and gas depletion deductions; and (4) decreases for items of loss or deduction. **Prop. Treas. Reg. § 1.1367-1(e)**.

Consistent with the proposed amendments to Treas. Reg. § 1.1367-1, the proposed regulations amend Treas. Reg. § 1.1368-2 to provide that for taxable years of the corporation beginning on or after August 18, 1998, the adjustments to the accumulated adjustments account (AAA) are made in the same order as the adjustments to the basis of a share of stock under Prop. Treas. Reg. § 1.1367-1. For purposes of determining the amount of any distribution made from the AAA, decreases to the AAA to reflect distributions are made without taking into account any net negative adjustments as defined in I.R.C. § 1368(e)(1)(C)(ii). **Prop. Treas. Reg. § 1.1368-1(e)**.

Section 1311(a) of TRA 1996 generally eliminated the S corporation earnings and profits of a corporation accumulated in those taxable years beginning before January 1, 1983, for which the corporation was an electing small business corporation under the provisions of subchapter S of the Code as then in effect, if the corporation was also an S corporation for its first taxable year beginning after December 31, 1996. Several provisions of the existing final regulations under subchapter S, which were adopted before the 1996 Act amendments, refer separately to S corporation earnings and profits and C corporation earnings and profits. See, e.g., Treas. Reg. § 1.1368-1(f)(2)(iii). The IRS requested comments on the extent, if any, to which these regulations should be amended in view of the general elimination of S corporation earnings and profits. **63 Fed. Reg. 44181 (Aug. 18, 1998)**.

TRANSFEREE LIABILITY. The taxpayer was the sole shareholder of a corporation. The corporation transferred real property to the shareholder for less than full value, although the shareholder three years later executed a promissory note for the unpaid value. The corporation was assessed taxes by the IRS and the IRS assessed the taxes to the taxpayer when the corporation failed to pay the taxes. The IRS claimed that the real property was fraudulently transferred. The taxpayer argued that the IRS was prevented from assessing the taxpayer because the period for bringing fraudulent transfer actions under California's Uniform Fraudulent Transfer Act had elapsed. The court held that the IRS was not bound by the limitation period of the Cal. UFTA. The court also held that the real property was fraudulently transferred and that the assessment of transferee liability was timely filed. **Bresson v. Comm'r, 111 T.C. No. 6 (1998)**.

LABOR

TRANSPORTATION. The plaintiffs were agricultural workers employed by the defendant. The defendant required the plaintiffs to meet at specified assembly areas for transport by the defendant's vehicles to the daily work site. The plaintiffs were prohibited from using their own vehicles to get to the work sites. The plaintiffs sought a ruling that the defendant was required to compensate the plaintiffs for the time at the assembly point for waiting for the defendant's vehicles to pick them up and for the times spent in transit to the work site and back. Under Industrial Welfare Commission Wage O..rder No. 14-80, agricultural employers were required to compensate agricultural workers for "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." The plaintiff argued that the wage order included transportation time where the employee was required to use the employer's transportation. The court held that the defendant was not required to compensate the plaintiffs for the transportation time because the plaintiffs were not working during the transportation. The court seems to reason that the second and third phrases of the quoted portion of the wage order were restricting the broader words of the first part. Yet the grammatical structure of the quoted section seems to indicate that compensation is to be paid for all times an employee is under the control of the employer, including, but not only, the times when work is done, whether or not required. The court interpretation makes the first portion extraneous, violating a doctrine of interpretation that all words must be given meaning. The case was submitted by Michael Mauer of Los Angeles. **Morillion v. Royal Packing Co., 98 Daily Journal D.A.R. 8891 (Cal. Ct. App. 1998)**.