An employer's mileage allowance may be paid at a flat rate or stated schedule combining fixed and variable rate (FAVR) payments, both of which must be paid quarterly. Periodic fixed payments cover projected fixed costs of driving a standard automobile in connection with the employee's performance of services in a base locality. Periodic variable payments cover projected operating costs under the same assumptions.

A fixed and variable rate allowance may not be paid if the employee has claimed other than straight line depreciation on the motor vehicle or claimed expense method depreciation.

Safe harbor

It is important to remember that a vehicle used during most of a normal business day directly in connection with the business of farming may be treated as 75 percent used in the business plus whatever percentage, if any, is included in an employee's gross income.[18]

FOOTNOTES

1 Rev. Proc. 91-67, 1991-2 C.B. 887. See generally 4 Harl, **Agricultural Law** § 28.02[4][a] (1992).

2 Rev. Proc. 91-67, 1991-2 C.B. 887.

3 *Id.*

4 *Id*. See Rev. Proc. 90-59, 1990-2 C.B. 644; Rev. Proc. 89-62, 1989-2 C.B. 782.

5 Rev. Proc. 83-74, 1983-2 C.B. 593; Rev. Proc. 85-49, 1985-2 C.B. 716.

6 Rev. Proc. 91-67, 1991-2 C.B. 887.

7 *Id.*

8 I.R.C. § 163(h)(2)(A).

9 I.R.C. § 164.

10 Rev. Proc. 91-67,1991-2 C.B. 887.

11 *Id.*

12 Rev. Proc. 92-17, I.R.B. 1992-8, 16; Rev. Proc. 89-66, 1989-2 C.B. 792.

13 See Rev. Proc. 92-17, I.R.B. 1992-8, 16.

14 1989-2 C.B. 792.

15 I.R.B. 1992-8, 16.

16 Temp. Treas. Reg. § 1.274-5T(f)(5)(ii) (including individuals owning more than 10 percent of stock of corporation).

17 Rev. Proc. 90-34, 1990-1 C.B. 552; Rev. Proc. 91-67, 1991-2 C.B. 887. See Ltr. Rul. 9117052, Jan. 30, 1991 (plan set up as FAVR but requirements not met).

18 Temp. Treas. Reg. § 1.274-6T(b).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL

ADMINISTRATIVE EXPENSES. During the debtor's long bankruptcy case, the debtor's former wife, before divorcing the debtor, assisted the estate in post-petition financing and operating the farm business. The former spouse filed adminstrative claims for wages and rent of machinery to the estate but the claims were denied because the claims were not presented prior to the estate's filing of the plan. The former spouse's claims for the costs of other labor were denied because of insufficient records of the labor provided. Other claims for machinery rent were denied because the former spouse failed to demonstrate how the machinery use benefited the estate or other creditors or that the former spouse even owned the machinery leased. ***In re* Bellman Farms, Inc., 140 B.R. 986 (Bankr. D. S.D. 1991)**.

DISCHARGE. The debtor entered into a joint venture with a creditor to operate a cattle breeding ranch. The creditor provided the equipment, working capital and real property. The debtor was to provide personal services in operating the ranch and the parties were to split all profits and losses. After the creditor terminated the joint venture, several pieces of equipment were found to be missing, the proceeds of the sale of two steers were missing from the business account, and the proceeds of the sale of a prize steer were not deposited in the business account. The court held that the joint venture placed the debtor in a fiduciary capacity and that the failure of the debtor to account for all joint venture property was defalcation; thus, the value of the missing equipment and one-half (the creditor's share) of the missing proceeds from the cattle sales were nondischargeable debts. ***In re* Shane, 140 B.R. 964 (Bankr. N.D. Ohio 1992)**.

ESTATE PROPERTY. The debtors purchased a farm with another couple with each couple owning an equal portion as tenants in common. A portion of the purchase price was secured by a mortgage. The other couple later pre-paid their portion of the mortgage balance and the parties entered into an agreement which provided that if the debtors defaulted on their remaining portion of the mortgage, the other couple could make the payments, with a corresponding increase in their ownership share of the farm. If the entire balance of the mortgage was paid by the other couple, the debtors would be required to assign their entire beneficial ownership interest in the farm to the other couple. After this agreement was entered into, the debtors assigned their beneficial interest in the farm to a bank as security for loans. The bank was also a trustee holding the debtor's interest in the farm under a land trust. The farm was leased to a corporation owned by the son of the other couple with the rent to be divided according to the parties' beneficial interests in the farm. After the debtors defaulted on their portion of of the real estate taxes and mortgage, the debtors transferred their beneficial interest in the farm to the other couple who then collected all the rent from the lease. The estate sought recovery of the debtors' portion of the rents collected after the filing of the bankruptcy petition. Although the court held that the debtors retained a sufficient interest in the farm to claim the rents received post-petition, the court held that the agreement between the couple was enforceable as between the debtors and the other couple, even though the bank had already been assigned the debtor's beneficial interest in the farm. Therefore, the debtors did not have any enforcable right to the rents after the other couple paid the delinquent taxes and defaulted mortgage payments. **Matter of Drewry, 966 F.2d 236 (7th Cir. 1992),** ***aff'g unrep. D. Ct. dec. aff'g*****, 99 B.R. 206 (Bankr. N.D. Ind. 1990)**.

EXECUTORY CONTRACTS. The debtors had entered into a land installment contract which became part of the bankruptcy estate. The trustee filed a motion to assume the contract and planned to sell the debtors' interest in the property to a third party. The court held that the contract was an assumable executory contract under Section 365(a). The debtors argued that the contract was not assumable under Section 365(c) because the contract required the personal services of the debtors. The court held that the land installment contract was not a personal services contract and allowed the trustee to assume the contract. ***In re*** **Raby, 139 B.R. 833 (Bankr. N.D. Ohio 1991)**.

EXEMPTIONS.

TOOLS OF THE TRADE. The debtors lived in a mobile home on property owned by one debtor's parent. The debtors used their farm equipment to do custom combining and other work for other farmers. The debtors sought to exempt farm machinery and equipment under 31 Okla. Stat. §§ 1(A)(5) and (A)(6). Section 1(A)(5) provided an exemption for implements of husbandry necessary to farm the homestead. The court held that this section did not apply because the debtors did not own any land farmed or lived on by them. Section 1(A)(6) allowed an exemption for tools used in a trade. A creditor argued that this exemption was not available because farm equipment was exempted only under Section 1(A)(5). The court held that custom combining was a trade and that farm machinery could be exempted under this provision. The court noted that although a farmer could have the advantage of the use of both exemptions, the statute allowed only a total of $5,000 per person, thus limiting the total exemptions fairly among all debtors. The case involved the certification of questions from a federal District Court. **Lindsey v. Kingfisher Bank & Trust Co., 832 P.2d 1 (Okla. 1992)**.

CHAPTER 13

PLAN. The Chapter 13 plan proposed to pay unsecured creditors 6 percent of their claims. A creditor with a mortgage on the debtor's house objected to the plan as not paying as much as would be received in a Chapter 7 liquidation. As to the residence, the debtor had taken the fair market value and subtracted the costs of sale as 10 percent, including broker's fees, attorney's fees, closing costs and capital gains taxes. The creditor argued that a Chapter 7 trustee would be able to use the $125,000 gains exclusion on the residence which was available to the debtor who was over 55. The debtor's spouse was not a debtor in the case. The court held that the plan could determine the amount of proceeds of a Chapter 7 liquidation of the residence by deducting the costs of sale. The costs would include the tax on any capital gain because the $125,000 exclusion would not be available to the trustee because the nondebtor spouse would not be involved in the bankruptcy case and could not be forced to join in the election. ***In re*** **Dixon, 140 B.R. 945 (Bankr. W.D. N.Y. 1992)**.

FEDERAL TAXATION

CORPORATIONS. Under I.R.C. § 382(a), if a loss corporation has an ownership change during a Chapter 11 case, the amount of the corporation's taxable income for a post-change taxable year that can be offset by pre-change losses and credits is limited to the value of the corporation multiplied by the long-term tax exempt rate. The IRS has issued proposed regulations governing the increase in the value of the loss corporation resulting from the exchange of stock for debt. See I.R.C. § 382(l)(6). The proposed regulations provide that the value of a loss corporation is the lesser of the value of the stock immediately after the ownership change and the value of the corporation's assets before the change. **Prop. Treas. Reg. § 1.382-3(j)**. This allows the corporation to increase its value for direct as well as indirect exchanges of stock for debt.

However, the new rule does not apply to the extent stock is issued with the principal purpose of increasing the value of the corporation without subjecting the investment to the entrepreneurial risks of corporate business operations. **Prop. Treas. Reg. § 1.382-3(k)(6)**. **57 Fed. Reg. 34736 (Aug. 6, 1992)**.

TAX LIENS. The debtor corporation had granted a security interest in corporation property to an officer of the corporation and the security interest was perfected by a filing in Texas where the corporation had its headquarters. The security interest was not refiled in Georgia after the corporation moved to that state. After the move to Georgia, the corporation granted to a bank a security interest in a truck purchased by the corporation using the funds borrowed from the bank. This security interest was perfected by the bank's obtaining of the certificate of title from the Georgia Department of Revenue. A federal tax lien was filed against the corporation's property after the move to Georgia and after the purchase of the truck. The court held that the officer's failure to refile the security interest in Georgia within four months after the move caused the security interest to become unperfected and subordinate to the subsequently filed federal tax lien. The court also held that the purchase money security interest of the bank had priority over the tax lien because the security interest was perfected. **Matter of Specialty Contracting & Supply, Inc., 140 B.R. 922 (Bankr. N.D. Ga. 1992)**.

FEDERAL AGRICULTURAL PROGRAMS

COTTON. The AMS has adopted as final regulations revising the classification of cotton to provide for the separation of grade into its chief components of color and leaf. The revised regulations also eliminate the descriptive standards for Light Gray, Gray and Plus grades and the averaging rule. **57 Fed. Reg. 34495 (Aug. 5, 1992)**.

POULTRY INSPECTION. The plaintiffs were poultry growers' associations who challenged the regulations providing standards on imported poultry. Under the 1985 Farm Bill, 21 U.S.C. § 466(d) was amended to require that imported poultry be subject to the same standards of inspection and processing as domestic poultry. The FSIS issued regulations governing imported poultry to provide that such poultry be processed in facilities meeting standards of inspection and sanitation "at least equal to" those in the U.S. The regulatory language "at least equal to" was retained although several members of Congress filed written objections and the 1990 Farm Bill contained findings and sense of Congress provisions declaring that the "at least equal to" language did not meet the statutory requirement of "as same as." The court held that the regulations were invalid and unenforceable as violating the statutory requirement that standards for imported poultry be the same as standards for domestic poultry. **Mississippi Poultry Ass'n, Inc. v. Madigan, 790 F. Supp. 1283 (S.D. Miss. 1992)**.

FEDERAL ESTATE AND GIFT TAX

GENERATION SKIPPING TRANSFERS. In 1976, the taxpayer received an interest in trust from a predeceased spouse which gave the taxpayer a general power of appointment over the trust corpus. In 1976, the taxpayer disclaimed a portion of the power of appointment such that the taxpayer retained only a power to appoint trust property to the issue of the taxpayer and the predeceased spouse, the spouses of the issue, and charities. The taxpayer executed a will which appointed the trust corpus to trusts for the taxpayer's children with remainders to other descendants. The appointment clause provided that either all interests in the trusts must vest within 21 years of a life in being at the death of the taxpayer or the trusts are to terminate by that time. The IRS ruled that the marital trust was irrevocable prior to 1985 and that the testamentary exercise of the special power of appointment would not subject the trust to GSTT. **Ltr. Rul. 9229018, April 17, 1992**.

MARITAL DEDUCTION. The taxpayer's will provided for distribution of estate property to a marital trust. The will provided that the trust was to be the primary beneficiary of any IRA or pension plans owned by the taxpayer at death. The marital trustee was to distribute from the IRA distributions, at least annually, an amount equal to the income earned by the IRA. If the IRA distributed less than its income for a taxable year, the trustee was to demand additional distributions from the IRA to at least equal the IRA income. The IRS ruled that the interest in the IRA account which passed to the marital trust would be QTIP, even though the IRA would make distributions to the trustee before distributions would be made by the trustee to the surviving spouse. **Ltr. Rul. 9229017, April 17, 1992**.

At death, the decedent owned an interest in an annuity which was to have begun payments to the decedent six years after the decedent's death. The surviving spouse was the remainder beneficiary of the annuity contracts which provided five options for payments: (1) a lump sum; (2) a lifetime monthly annuity; (3) monthly payments for the lifetime of the spouse, with payments after the surviving spouse's death to a beneficiary named by the spouse for a total period of 10 or 20 years; (4) monthly payments for a guaranteed period, with payments after the surviving spouse's death to a beneficiary named by the spouse for the remainder of the guaranteed period; and (5) interest only payments for the life of the spouse or guaranteed period, with payments after the surviving spouse's death to a beneficiary named by the spouse for the remainder of the guaranteed period. The IRS ruled that all of the options were terminable interests eligible for the marital deduction without a QTIP election. The IRS also ruled that if the surviving spouse named a remainder payee under the last four options, a taxable gift would occur. **Ltr. Rul. 9229034, April 22, 1992**.

The decedent's 1968 will bequeathed property to the surviving spouse to the extent of the maximum marital deduction "to the extent of the federal estate tax laws in effect at my death." The IRS ruled that the marital bequest was not a formula clause and the estate was eligible for the unlimited marital deduction because the clause was a specific indication that the decedent intended the changes in federal estate tax law to apply to the bequest. **Ltr. Rul. 9231012, April 12, 1992**.

SPECIAL USE VALUATION. The House Ways and Means Committee has reported a bill, H.R. 5647, which would apply the 10-year recapture period for special use valuation property for decedents who died before 1982.

The Miscellaneous Revenue Act of 1992 (in proposed form) includes a provision allowing estates which make the special use valuation election and file the recapture agreement to perfect the election by providing any missing signature on the agreement within 90 days after the IRS requests the signature. H.R. 11, § 4706.

The decedent's estate made a protective special use valuation election on a timely filed estate tax return. The estate later determined that a special use valuation election was available and filed an amended return making the election. During an examination of the amended return, the IRS agreed to an increase in estate tax liability due to an increase in property not subject to the special use valuation election. The IRS ruled that the estate was still eligible to make the special use valuation election. **Ltr. Rul. 9230002, April 9, 1992**.

TRUSTS. The taxpayer transferred partnership interests to a trust for the taxpayer's spouse. The independent trustee had the discretion to distribute trust income and principal for the "pleasure, happiness or such other purpose" as the trustee deemed in the beneficiary's general welfare. The taxpayer had the power to remove the trustee without cause and to substitute anyone else, including the taxpayer, as successor trustee. The IRS ruled that the taxpayer was considered the owner of the trust income and corpus because the trustee discretion to distribute income and principal was not subject to an ascertainable standard. Therefore, the adjusted basis and holding periods of the contributed partnership interest were the same before and after contribution to the trust and Section 1041(a) did not apply to the transfer in trust to the taxpayer's spouse although the amount of partnership liabilities associated with the partnership interests exceeded the taxpayer's basis in the partnership interests. **Ltr. Rul. 9230021, April 28, 1992**.

VALUATION. The decedent's estate included property in a trust which included a 77 percent undivided interest in the decedent's residence. Also included in the estate was leased real property which contained underground storage tanks which, on the alternate valuation date, showed no evidence of leaks. The estate valued the interest in the residence at 77 percent of fair market value less a 15 percent fractional interest discount. The estate also argued that the value of the leased property should have been discounted for the possibility of leaks in the tanks. The court held that the 15 percent fractional discount would be applied because the fractional interest would have a general lack of control, lack of marketability, illiquidity and partitioning expenses. The discount in value of the leased property was not allowed because no evidence of leaks appeared at the date of valuation of the property. **Est. of Pillsbury v. Comm'r, T.C. Memo. 1992-425**.

The taxpayer owned 90 percent of the corporation's preferred stock and the taxpayer's child owned the rest of the preferred stock and all common stock. All stock was entitled to one vote but if the preferred stock were to be transferred other than to an unrelated party in a bona fide sale, the voting rights of the transferred stock would cease upon transfer. The stock transfer provision was in effect prior to October 9, 1990. The taxpayer transferred 1,000 shares of preferred stock to the child. The IRS ruled that the stock transfer was not subject to I.R.C. § 2701 because the transferor's interest in the corporation was of the same class, preferred stock, as the retained interest in the corporation. The IRS also ruled that the transfer was not subject to I.R.C. § 2704(a) because the lapse of voting rights was pursuant to a restriction placed on the stock prior to October 9, 1990. **Ltr. Rul. 9229028, April 21, 1992**.

FEDERAL INCOME TAXATION

EMPLOYEE. The taxpayer was a business which leased trucks with drivers to clients who were contract carriers. The taxpayer was responsible for all costs involved in operating the truck. The drivers are not given training or instructions but the taxpayer had the right to change the budgetary methods used by the drivers. The drivers were paid on a percentage commission basis, worked under the direction of the clients, and were responsible for the operation and care of the trucks while in the drivers' possession. The drivers did not receive sick pay, insurance or paid vacations and the taxpayer did not deduct federal employment taxes from the compensation paid to the drivers. The drivers' services were provided under the taxpayer's business name and the employment relationship could be terminated by either party without liability. The IRS ruled that the drivers were employees for federal employment tax withholding purposes. **Ltr. Rul. 9231006, April 28, 1992**.

HOBBY LOSSES. Loss deductions from a cattle raising activity were disallowed where the taxpayer did not operate the activity in a businesslike manner, did not keep adequate books and did not seek expert advice on cattle raising. **Lujan v. Comm'r, T.C. Memo. 1992-417**.

INSTALLMENT REPORTING. The taxpayer reported income from a real estate construction and sales business on the accrual method. In two consecutive taxable years, the taxpayer reported the entire gain from two sales in the taxable year of the sale, except the sale in the first taxable year was also reported in the second taxable year. After an audit of those years had begun, the taxpayer requested that the election out of installment reporting be revoked, arguing that the double reporting indicated that the taxpayer actually intended to use installment reporting of the gain. The IRS ruled that the revocation would not be allowed because of evidence that the taxpayer wanted to change the election to defer gain to years in which excess losses could be offset against the gain. The IRS ruled that this was insufficient motive for revoking the election. **Ltr. Rul. 9230003, April 10, 1992**.

INVESTMENT TAX CREDIT. The taxpayer purchased compressed gas cylinders and leased the cylinders to unrelated parties under five-year leases which were renewable from year to year after the first five years unless terminated by giving 12 months' prior notice. The taxpayers were denied investment tax credit because the leases were for an indefinite period because the leases could be continued until terminated by the parties. **Russell v. Comm'r, 92-2 U.S. Tax Cas. (CCH) ¶ 50,384 (7th Cir. 1992), *aff'g*, T.C. Memo. 1991-269**.

The taxpayers moved several 40 year old houses to a historic office subdivision and rehabilitated them, retaining over 75 percent of the existing external walls. The court held that the taxpayers were not entitled to rehabilitation credit for the houses because the houses were not rehabilitated in their original locations. **Nalle v. Comm'r, 99 T.C. No. 9 (1992)**.

The taxpayer leased warehouse shelving under a lease which provided reciprocal purchase and sale options to the parties. The court held that the taxpayer was not entitled to depreciation deductions or investment tax credit as to the leased property because the lease removed the risk of depreciation as well as the benefits of appreciation for the property. **Kwiat v. Comm'r, T.C. Memo. 1992-433**.

IRA'S. The decedent had established a qualified Section 401(a) pension plan which named the decedent's estate as sole beneficiary. The surviving spouse was the decedent's sole heir under the decedent's will and the estate elected to receive the amount in the pension plan in a lump sum distribution which would be distributed to the surviving spouse within one taxable year. The surviving spouse established an IRA for the purpose of receiving the pension plan distribution within 60 days after distribution. The IRS ruled that the contribution to the IRA from the pension plan distribution would qualify for rollover treatment under Section 408(a). **Ltr. Rul. 9229022, April 20, 1992**.

PARTNERSHIPS

ADMINISTRATIVE ADJUSTMENTS. The taxpayers, husband and wife equal partners, argued that their partnership was not eligible for the small partnership exception to the administrative adjustment rules because not all partnership items were shared equally between the partners as required by I.R.C. § 6231(a)(1), the "same-share" rule. The taxpayers argued that Treas. Reg. § 301.6231(a)(1)-1(a)(3) was invalid because it excluded some partnership items from consideration of whether the partners shared partnership items equally. The court held that regulation to be a valid implementation of the statute because the excluded items, such as guaranteed payments to a specific partner, did not have a direct tax effect on all partners. **McKnight v. Comm'r, 99 T.C. No. 8 (1992)**.

DEFINITION. The IRS has issued proposed regulations amending the limited partnership definition rules concerning the element of continuity of life. The proposed regulations provide that a limited partnership lacks continuity of life notwithstanding that a dissolution may be avoided by at least the remaining general partners agreeing to continue the partnership in the event of the withdrawal of a general partner, for whatever reason. **Prop. Treas. Reg. § 301.7701-2(b)(1)**.

A general partnership registered as a limited liability partnership under Texas law. The partnership agreement provided that a partner's interest in the partnership could not be transferred, assigned or encumbered without consent of the partnership. Because of this agreement provision, the IRS ruled that the partnership lack the corporate characteristic of free transferability of interests. The state limited partnership act provided that all partners are agents of the partnership unless the partner had no such authority under the partnership agreement and the person with whom the partner was dealing had knowledge of the partner's lack of authority. The IRS ruled that because of this provision, the partnership lacked the corporate characteristic of centralization of management. The IRS ruled that because the partnership lacked two of the four corporate characteristics, the partnership would be considered a partnership for federal income tax purposes. The IRS also ruled that the partnership's registration as a limited liability partnership did not cause a termination of the partnership. **Ltr. Rul. 9229016, April 16, 1992**.

RETURN PREPARERS. The accountant of a partnership prepared the Schedule K-1 for several partners whose individual returns substantially understated gross income. The accountant was assessed the $500 penalty of I.R.C. § 6694(b) as a preparer of the partners' *individual* returns. The court acknowledged the rule that a person is considered a preparer of a return if the person prepares a schedule which comprises a substantial portion of the return. The accountant was found not to be the preparer of the partners' individual returns because the returns were complicated, with the Schedule K-1's being a subordinate portion of the items constituting the returns. **Drobny v. U.S., 92-2 U.S. Tax Cas. (CCH) ¶ 50,378 (N.D. Ill. 1992)**.

PENSION PLANS. The IRS has issued a revenue procedure providing model language for use in executive unfunded deferred compensation arrangements, so-called "Rabbi trusts." The revenue procedure also provides guidance for requesting rulings on nonqualified deferred compensation plans that use such trusts. **Rev. Proc. 92-64, I.R.B. 1992-33, 23**.

PRE-PAID FEED EXPENSES. The taxpayer, a physician, purchased cattle and sold them after having the cattle fed at third party feedlots. The IRS had disallowed the deductions for a substantial portion of feed purchased by the taxpayer late in two taxable years. The IRS argued that the taxpayer was prohibited from currently deducting the feed expenses because the taxpayer was a farming syndicate under I.R.C. § 464. The court held that the taxpayer was not an active participant in a farming operation as to the feedlots because the taxpayer did not (1) participate in the management of the feedlots, (2) work in the feedlots, (3) live in the feedlots, or (4) hire or fire employees of the feedlots. The taxpayer was found to be merely a customer of the feedlots which contracted for feeding services as independent contractors. The court also held that the taxpayer's involvement as a buyer and seller of cattle was not a farming enterprise because the taxpayer was not involved in the raising, feeding, caring for or management of the cattle, but was merely an investor. Finally, the court held that the taxpayer had limited liability in the business because the taxpayer invested in a 100 percent hedge in the cattle futures market. Therefore, the taxpayer was held to be a limited entrepreneur not actively involved in a farming operation and not entitled to currently deduct pre-paid feed expenses in the taxable year before the taxable year in which the feed was actually used. **Est. of Wallace v. Comm'r, 965 F.2d 1038 (11th Cir. 1992)**.

RESPONSIBLE PERSON. The taxpayers were the president and sole shareholder of a corporation which operated a hotel and the manager of the hotel. After the corporation became delinquent on withheld employment taxes, the taxpayers and IRS reached an agreement on payment of the delinquent taxes. Before the entire amount could be paid, the corporation's creditors foreclosed against all of the corporation's property. The taxpayers were assessed the 100 percent penalty under I.R.C. 6672 for the unpaid amount. The court held that the president was a responsible person in that the president had the power to write checks and ordered payment of the taxes when the president learned that the taxes were delinquent. The manager was held to be a responsible person because the manager hired and fired employees and was responsible for payment of wages. The court also held that the failure to pay the taxes by both taxpayers was willful because neither paid the taxes when known to be due. The payment agreement did not absolve the taxpayers of the willful failure to pay the taxes. **Muck v. U.S., 791 F. Supp. 817 (D. Colo. 1992)**.

S CORPORATIONS

ADMINISTRATIVE ADJUSTMENTS. The IRS filed a timely FSAA with all shareholders of the S corporation except the taxpayer. No review of the FSAA was sought by the tax matters person or noticed shareholders. Notice of the FSAA was untimely sent to the taxpayer. The court held that because the Subchapter S tax items became non-subchapter S items on the date of the untimely notice to the taxpayer, the statute of limitations on the assessment of those tax items was extended one year from the date of the notice to the taxpayer. **Aufleger v. Comm'r, 99 T.C. No. 5 (1992)**.

WAGES. Payments made by a real estate developer to a brother were not compensation but were gifts excluded from self-employment income where the brother was not expected to provide services for the developer and the payments were not made for any business purpose. **Hughes v. Comm'r, T.C. Memo. 1992-438**.

LANDLORD AND TENANT

TERMINATION. In 1988 the parties entered into an oral lease to farm 560 acres for growing wheat. On August 30, 1988, the landlord sent written notice to the tenant terminating the lease as of August 1, 1989. Under Kans. Stat. § 58-2506(a), an oral lease can be terminated only by written notice at least 30 days before March 1 and must fix the termination date as March 1. However, under Kan. Stat. § 58-2506(b), the actual termination date for fall seeded crops is the date of harvest or August 1. Thus, the landlord's notice used the actual date and not the statutory date in the notice. The court held that the notice was effective because it substantially complied with the statutory requirements and purposes. **Mendenhall v. Roberts, 831 P.2d 568 (Kan. Ct. App. 1992)**.

NUISANCE

HOG FARM. The plaintiffs had lived next to the defendant's grain farm for over six years when the defendants started a hog raising operation on their property. The plaintiffs filed a private nuisance action against the defendants in an attempt to abate the odors from the hog operation. The court held that the right-to-farm statute did not apply because the plaintiffs had lived next to the defendant for six years before the defendant made a significant change in their operations by starting the alleged nuisance. However, because conflicting evidence was presented as to whether the hog operation caused any harm to the plaintiffs, the appellate court was required to uphold the trial court's finding that the defendant's hog operation was not a nuisance. **Wendt v. Kerkhof, 594 N.E.2d 795 (Ind. Ct. App. 1992)**.

RIPARIAN RIGHTS

LEVEE. The defendants constructed a levee on their farm which caused increased drainage of water onto the plaintiff's land from a river bordering both properties. More than five years after the construction of the levee, the plaintiff brought an action for money damages and an injunction to remove the levees. The trial court had ruled that the five year statute of limitations for an action involving injury to real property prevented the action for money damages. The court of appeals then held that the injunction action was barred by the doctrine of laches because the plaintiff waited too long to bring the action after damages started. The Illinois Supreme court reversed as to both rulings, holding that where the damage from a permanent structure produces continuing water damage to a servient property by increasing water flow, the five year statute of limitations only limits the damages recoverable to the five years prior to the filing of the action, but does not prevent the action itself. The Court also reversed the laches ruling because a prescriptive right to flood land belonging to another does not accrue until after 20 years of adverse and uninterrupted flooding known to the servient landowner. **Meyers v. Kissner, 594 N.E.2d 336 (Ill. 1992),** ***rev'g*****, 576 N.E.2d 1094 (Ill. Ct. App. 1990)**.

TRANSFER OF WATER RIGHTS. The defendant owned a decreed right to divert creek water for irrigation of 96 acres of farm land and applied for a new water diversion permit and for a transfer of the original right to irrigate different land. The plaintiff, a junior water rights holder, objected to the applications on the basis that some of the original water rights had been forfeited by nonuse and that the new permit would injure senior water rights. The court upheld the decision of the Director of the Department of Water Resources approving the transfer and permit which placed restrictions on the defendant's water use to ensure that senior water rights were not diminished. The decision allowed the additional diversion only during high water when the water flow exceeded all water rights and placed measuring devices on the defendant's diversion access. **Dovel v. Dobson, 831 P.2d 527 (Idaho 1992)**.

SECURED TRANSACTIONS

REPOSSESSION. The debtor had granted a security interest in a one-fourth interest in a race horse to a bank to secure a loan. After the debtor defaulted on payments on the loan, the bank offset amounts in the debtor's checking accounts and sued for the balance. Another bank which held security interests in the remainder of the race horse proposed a sale of the horse to which the debtor's bank agreed. The bank informed the debtor that one-fourth of the proceeds of the sale would be applied against the loan balance. The horse died before the sale. The debtor argued that the bank's statements shifted the burden of loss from the death of the horse to the bank. The court held that the bank had no actual or constructive possession of the horse and, therefore, had no obligation for the health of the horse. The debtor was not allowed to reduce the loan balance by one-fourth of the value of the horse. **Liberty Nat'l Bank & Trust v. Ginn, 832 P.2d 33 (Okla. Ct. App. 1992)**.

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STATE TAXATION

AGRICULTURAL USE. The taxpayer purchased agricultural land with the intent to eventually develop a residential subdivision. The land was annexed to the neighboring town and zoned as a planned unit development. The taxpayers pledged their water rights in the land to the town. The taxpayers leased the land to two ranchers for low rent which included uncompensated use of the water. The court held that the taxpayers were entitled to have the land taxed as agricultural land because the actual use of the land for the taxable year and two previous years was for agricultural purposes, even though the taxpayers themselves did not farm or ranch the land and the tenants may not have made a profit in their operations. **Boulder County Bd. of Equal. v. M.D.C. Const. Co., 830 P.2d 975 (Colo. 1992)**.

CITATION UPDATES

Mostowy v. U.S., 966 F.2d 668 (Fed. Cir. 1992), *aff'g*, 24 Cl. Ct. 193 (1991) (capital gains), see p. 118 *supra*.

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