court concluded that the transaction produced income in the year of sale with the sale deemed completed in the year of contract execution for the seller which was on the accrual method of accounting.[13] The Tax Court pointed out that the seller only had a security interest in the property.

Interestingly, the Tax Court acknowledged that the seller did not argue that the statutory authority for installment reporting of gain, I.R.C. § 453, applied.[14] That may have been because of the dealer exception to the statutory authority for installment reporting,[15] which arguably would have applied.

The Tax Court specifically noted that its 1967 decision, *Baertschi v. Comm'r*,[16] would no longer be followed.[17] That case had been reversed by the Sixth Circuit Court of Appeals in 1969.[18] In the Tax Court decision in *Baertschi v. Comm'r*,[19] the taxpayers had entered into an installment contract for the sale of a residence. The issue was whether the taxpayers were eligible for the rollover of gain under I.R.C. § 1034 (which was repealed in 1997). The Tax Court held that the contract did not constitute a "sale" of the property on the date entered into for purposes of the then-available statutory rollover of gain by reinvestment in a replacement residence. The Tax Court held that "sale" occurred later when final payment was made on the contract.[20] Thus, the gain was eligible for rollover treatment. Five Tax Court judges dissented from the majority opinion in the court-reviewed decision.[21]

The Sixth Circuit Court of Appeals, however, reversed the Tax Court[22] and held that the sale transaction was consummated on the date benefits and burdens of ownership had passed to the buyers and the buyers had paid a substantial part of the sales price.[23] The sellers at that point had "absolute right to title on payment of the full purchase price."[24] Accordingly, the taxpayers were not eligible for the rollover of gain inasmuch as they did not occupy the replacement property within 18 months, the statutory period at that time.

In conclusion

The Tax Court took the position, under the facts of the case of *Keith v. Comm'r*, that sale was consummated and income tax was properly imposed on the transaction in the year of contract execution.[25] The decision leaves open an obvious question: is the opinion limited to accrual accounting taxpayers? Arguably, it is so limited. Certainly, I.R.C. § 453 constitutes clear authority for installment reporting of gain. An argument can be made that, with repeal of the ban on installment reporting by those on accrual accounting,[26] Congress intended for accrual taxpayers to be eligible for installment reporting as well.

Unfortunately, the application of I.R.C. § 453 was not argued in *Keith v. Comm'r.*[27] If the *Keith* decision is limited to dealer reporting, the impact is likely to be modest.

FOOTNOTES

1 Installment Sale Correction Bill, H.R. 3594, 106th Cong., 2d Sess. (2000), *repealing* Pub. L. 106-170, Sec. 536, 106th Cong., 1st Sess. (1999), amending I.R.C. § 453(a)(2). See generally, 6 Harl, *Agricultural Law* § 48.03 (2000); Harl, *Agricultural Law Manual* § 6.03[1] (2000). See also Harl, "New Limits on Installment Reporting" 11 *Agric. L. Dig.* 9 (2000).

2 Keith v. Comm'r, 115 T.C. No. 42 (2000).

3 See I.R.C. § 453(a), (l)(2)(A), added by Pub. L. 106-170, 106th Cong., 1st Sess. (1999).

4 I.R.C. § 453(a), (l)(2)(A), (B).

5 See Harl, "New Limits on Installment Reporting" 11 *Agric. L. Dig.* 9 (2000).

6 I.R.C. § 453(b)(2)(B). See 4 Harl, *Agricultural Law* § 25.03[2] (2000).

7 *Id.*

8 See 4 Harl, *supra* note 6, § 25.03[2].

9 See 4 Harl, *supra* note 6 § 25.03[3].

10 See note 1 *supra*.

11 H.R. 3594, 106th Cong., 2d Sess. (2000).

12 115 T.C. No. 42 (2000).

13 *Id.*

14 *Id.*

15 See I.R.C. § 453(b)(2)(A).

16 49 T.C. 289 (1967).

17 Keith v. Comm'r, 115 T.C. No. 42 (2000).

18 Baertschi v. Comm'r, 412 F.2d 494 (6th Cir. 1969), *rev'g*, 49 T.C. 289 (1967).

19 49 T.C. 289 (1967).

20 *Id.*

21 *Id.*

22 Baertschi v. Comm'r, 412 F.2d 494 (6th Cir. 1969), *rev'g*, 49 T.C. 289 (1967).

23 *Id.*

24 *Id.*

25 Keith v. Comm'r, 115 T.C. No. 42 (2000).

26 H.R. 3594, 106th Cong., 2d Sess. (2000).

27 115 T.C. No. 42 (2000).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

FEDERAL TAX-*ALM* § 13.03[7].*

DISCHARGE. The debtor owed taxes for 1987, 1988 and 1989 and filed for bankruptcy in August 1990. That case was dismissed in October 1994 and the current case was filed in January 1995. The debtor sought to discharge all of the taxes as taxes assessed more than three years before the filing of the petition in the current case. The previous hearings in this case held that the filing of a bankruptcy petition did not toll the three year period of Section 507(a)(8)(A)(i); however, the 11th Circuit Court of Appeals remanded the case, holding that the Bankruptcy Court could exercise its equitable powers to toll the three year period. The court held that the 1987 and 1988 taxes were dischargeable because the IRS had sufficient time to assess and collect those taxes before the filing of the first bankruptcy

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case in August 1990. However, the court held that the 1989 taxes were not dischargeable because the IRS did not have sufficient time to attempt to collect the taxes after the assessment, in May 1990, and before the filing of the first bankruptcy case and between the time of dismissal of the first case, in October 1994, and the filing of the current case in January 1995. ***In re*** **Morgan, 255 B.R. 247 (Bankr. N.D. Ga. 2000),** ***on rem. from*** **182 F.3d 775 (11th Cir. 1999)**.

ENVIRONMENTAL LAW

CLEAN WATER ACT. Several cities selected an old sand and gravel pit area as a landfill. The EPA ruled that the cities needed a permit in order to fill in the ponds and water-filled trenches on the property, citing the migratory bird rule that any body of water used by migratory birds was included as navigable waters under the Clean Water Act (CWA). The U.S. Supreme Court held that the migratory bird rule was not authorized by the CWA and the ponds and trenches were not navigable waters governed by the CWA. The Digest will publish an article by Roger A. McEowen on this case in a future issue. **Solid Waste Agency, Inc. v. United States Army Corps of Engineers, No. 99-1178, 2001 U.S. LEXIS 640 (Jan. 9, 2001),** ***rev'g*****, 191 F.3d 845 (7th Cir. 1999),** ***aff'g*****, 998 F. Supp. 946 (N.D. Ill. 1998)**.

FEDERAL AGRICULTURAL PROGRAMS

FEEDLOTS. The EPA has published proposed regulations amending the National Pollutant Discharge Elimination System (NPDES) provisions that define which operations are concentrated animal feeding operations (CAFOs) and establish permit requirements, and the Effluent Limitations Guidelines for feedlots (beef, dairy, swine and poultry subcategories), which establish the technology-based effluent discharge standards for CAFOs The proposed regulations would add more restrictions on large animal feedlot operations in order to decrease the air and water pollution possible from these operations. The draft regulations would (1) expand the permit process to include smaller feedlots currently exempted from permit regulation; (2) place more controls on discharge of waste from lagoons and on to fields and (3) hold corporations responsible for waste disposal on contract farms. **66 Fed. Reg. 2959 (Jan. 12, 2001)**.

KARNAL BUNT. The APHIS has issued proposed regulation which amend the Karnal bunt regulations to provide compensation for certain growers, handlers, seed companies, owners of grain storage facilities, flour millers, and participants in the National Karnal Bunt Survey who incurred losses and expenses because of Karnal bunt in the 1999-2000 crop season. **66 Fed. Reg. 3505 (Jan. 16, 2001)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT. The debtor was a corporation which operated a chain of restaurants. The debtor had received, but not paid for, produce from a produce supplier. The supplier sought to have some of the debtor's assets declared to be part of the PACA trust from which the supplier's claims should be paid. The debtor argued that PACA did not apply to the debtor because the debtor was not a dealer under the act. The statute, 7 U.S.C. § 499e(b)(6), defined a dealer as a person in the business of buying or selling wholesale or jobbing quantities of perishable agricultural commodities. The regulations, 7 C.F.R. § 46.2(x), defined "wholesale or jobbing quantities" as at least one ton of aggregate commodities in any one day. The debtor often received more than one ton of commodities in any given day. The court, however, declared the terms "wholesale or jobbing quantities" as ambiguous and found a statement of the USDA in the legislative history that the USDA did not consider restaurants to be dealers unless they purchased commodities for other entities. The lower courts held that the debtor, as a restaurant, was not intended by the law, as interpreted by the USDA, to be a dealer under PACA; therefore, no PACA trust existed to satisfy the claim of the supplier. The appellate court reversed, holding that the statutory definition of "wholesale or jobbing quantities" was not ambiguous; therefore, because the debtor purchased more than $230,000 in commodities per year and more than one ton in a single day, the debtor was a dealer under PACA. ***In re*** **Old Fashioned Enterprises, Inc., No. 00-1745, (8th Cir. Jan. 5, 2001),** ***rev'g*****, 245 B.R. 639 (D. Neb. 2000)**.

STORAGE FACILITIES. The CCC has adopted as final regulations implementing a farm storage facility loan program to provide financing for producers to build or upgrade farm storage and handling facilities. Specific eligibility requirements for applicants are a satisfactory credit rating as determined by CCC; no delinquent federal debt as defined by the Debt Collection Improvement Act of 1996; production of facility loan commodities; proof of crop insurance from FCIC or a private company; compliance with USDA provisions for highly erodible land and wetlands; ability to repay the debt resulting from the program; compliance with any applicable local zoning, land use and building codes for the applicable farm storage facility structures; and need for new or additional farm grain storage or handling capacity. **66 Fed. Reg. 4607 (Jan. 18, 2001), adding 7 C.F.R. Part 1436**.

FEDERAL ESTATE AND GIFT TAX

ESTATE PROPERTY. The decedent owned a 390 acre ranch in which the decedent had conveyed title to a daughter. In the state court probate proceedings for the estate, the daughter sought to quiet title to the ranch and ranch equipment in her. The state court ruled that the ranch and equipment was not owned by the daughter but were held in a constructive trust for the estate. The state court specifically ruled that the daughter did not provide any consideration for the transfer of title and that the decedent did not intend to give the ranch to the daughter. The estate still excluded the ranch from the gross estate and the IRS sought summary judgment based upon the state court judgment. The Tax Court held that, because of the state court judgment, the estate was estopped from claiming that the ranch and equipment were not owned by the estate. **Estate of Chemodurow v. Comm'r, T.C. Memo. 2001-14**.

MARITAL DEDUCTION. The decedent's will provided for property passing in trust to the surviving spouse. The trust provided for an annuity for the life of the spouse with the remainder passing to the decedent's children. The spouse filed a

petition in the state probate court to receive the surviving spouse's elective share. The estate and spouse settled before trial and the spouse received a lump-sum payment in satisfaction of the elective share claim. The estate claimed a marital deduction for the settlement amount. The court held that a settlement amount was deductible by the estate only if the right to estate property was deductible. The court reasoned that the surviving spouse's interest in the estate was either the annuity, a nondeductible terminable interest, or an annuity as part of the satisfaction of the elective share amount. Because the annuity was not eligible for the marital deduction, the settlement amount in lieu of the annuity was not deductible. The portion of the resulting settlement amount which exceeded the annuity was deductible. Although the estate cited Treas. Reg. § 20.2056(c)-2 and *Waldrup v. United States, 499 F. Supp. 820 (N.D. Miss. 1980)*, the court based its holding on the argument that allowing a settlement to change the deductible nature of property received from an estate would create a loophole that would circumvent the estate tax. **Davies v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 60,391 (D. Me. 2000)**.

VALUATION. A C corporation had three shareholders and one class of stock, voting common stock with par value of one dollar per share. The bylaws governing the stock were adopted prior to October 9, 1990. The corporation amended the bylaws to recapitalize the stock by issuing nonvoting common stock which was issued as a dividend to the shareholders. The only difference between the stocks was the right to vote; however, the nonvoting and voting stock had the right to vote in certain major corporate decisions. The IRS ruled that the creation of the second class of stock did not result in more than a de minimis change of the bylaws under Treas. Reg. § 25.2703-1(c), and did not subject the stock to I.R.C. § 2703. **Ltr. Rul. 200103038, Oct. 20, 2000**.

FEDERAL INCOME TAXATION

ALTERNATIVE MINIMUM TAX. In a Chief Counsel Advice letter, the IRS has ruled that a taxpayer who uses the standard deduction in computing taxable income for regular tax purposes may not use itemized deductions when computing alternative minimum taxable income for alternative minimum tax purposes. At issue was the provision in I.R.C. § 56(b)(1)(F) which states that the I.R.C. § 68 limitation on itemized deductions did not apply for AMT purposes. The IRS ruled that this provision did not provide authority that itemized deductions could be taken for AMTI purposes when the standard deduction was taken for regular taxable income purposes. **CCA Ltr. Rul. 200103073, Dec. 15, 2000**.

C CORPORATIONS-*ALM* § 7.02[3].*

DEDUCTIONS. The taxpayer corporation was owned by one shareholder. The shareholder and wife both worked for the corporation for several years. The shareholder and wife divorced but the wife continued to work for the corporation until their relationship interfered with the office operations. The corporation entered into an agreement with the wife to pay her a full salary for life with inflation adjustments and the taxpayer claimed the payments as a business expense. The court found that the agreement had no business purpose but was intended to resolve and meet the husband's property and alimony obligations from the divorce; therefore, the corporation was not entitled to deduct payments for the husband's personal obligations. **WSB Liquidating Corp. v. Comm'r, T.C. Memo. 2001-9**.

DEFINITION. The IRS has issued proposed regulations governing the income tax treatment of an election, the "check the-box" election, by an association to be treated as a partnership or to be disregarded as an entity separate from its owner. The proposed regulations provide that an elective conversion of an association to a partnership is deemed to have the following form: the association distributes all of its assets and liabilities to its shareholders in liquidation of the association, and immediately thereafter, the shareholders contribute all of the distributed assets and liabilities to a newly formed partnership. The proposed regulations also provide that an elective conversion of an association to an entity that is disregarded as an entity separate from its owner is deemed to have the following form: the association distributes all of its assets and liabilities to its single owner in liquidation of the association. **66 Fed. Reg. 3959 (Jan. 17, 2001)**.

DISTRIBUTIONS OF STOCK. The IRS has withdrawn proposed regulations,*64 Fed. Reg. 46155 (Aug. 24, 1999),* relating to recognition of gain on certain distributions of stock or securities of a controlled corporation in connection with an acquisition. The proposed regulations will be reissued. **Ann. 2001-11, I.R.B. 2001-__**.

EMPLOYEE STOCK OPTION PLAN. The taxpayer corporation maintained an ESOP funded with the taxpayer's stock. Under the ESOP, if the taxpayer pays a dividend on the stock, the plan allocates the dividends (1) to each participant's account, (2) to cash payments to the participants or (3) to repay loans to the participants from the plan. When participants terminate employment, the taxpayer distributes cash in exchange for the participant's stock in the plan. The taxpayer argued that the payment of cash was an "applicable dividend" under I.R.C. § 404(k) and was deductible by the taxpayer. The IRS ruled that the distribution payments were not dividends and were not deductible by the taxpayer corporation. **Rev. Rul. 2001-6, I.R.B. 2001-__**.

COURT AWARDS AND SETTLEMENTS-ALM § 4.02[14]. The U.S. Supreme Court has denied certiorari in the following case. The taxpayers had filed a lawsuit in tort and contract against their employer for wrongful termination of employment and had received a jury award for compensatory and punitive damages. The taxpayers had agreed to pay their attorneys on a contingency fee basis and a portion of the award was paid to the attorneys. As in *Coady v. Comm'r, 2000-1 U.S. Tax Cas. (CCH) ¶ 50,528 (9th Cir. 2000)* (Alaska attorney fee lien), the court looked at the nature of the attorney's lien created by statute in California and held that the lien did not create a sufficient property interest in the jury award to exclude the fees from the taxpayers' income. See Harl, "Handling Legal Fees in Settlements," 11 *Agric. L. Dig.* 129 (2000). **Benci-Woodward v. Comm'r, 219 F.3d 941 (9th Cir. 2000)**.

DISASTER PAYMENTS. On JANUARY 12, 2001, the president determined that certain areas in Louisiana were eligible for assistance under the Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121, as a result of severe ice storms and flooding beginning on December 11, 2000. **FEMA-1357-DR**. Accordingly, a taxpayer who sustained a loss attributable to the disaster may deduct the loss on his or her 1999 federal income tax return.

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EARNED INCOME CREDIT. The taxpayers were not married but lived in the same household with three children. The taxpayers filed separately. The male taxpayer had a larger modified adjusted gross income than the female taxpayer. One child was the child of both taxpayers and two children were the children of the female taxpayer. The male taxpayer listed the shared child in claiming the earned income credit and the female taxpayer listed the other two children in claiming the earned income credit. The IRS disallowed the female taxpayer's earned income credit and notified the taxpayers that the male taxpayer was the only person eligible for the earned income credit and that all three children had to be listed on his return for purposes of the earned income credit. The court found that the statute, I.R.C. § 32(c)(1)(C) had been amended to include all eligible children on the return of the taxpayer with the highest modified adjusted gross income, whether or not they were identified on that taxpayer's return; therefore, because the female taxpayer's children were qualified children, as foster children, of the male taxpayer, they had to be included in calculating his earned income credit, even though they were not listed on his return. **Sutherland v. Comm'r, T.C. Memo. 2001-8**.

EXCHANGES. The IRS has issued a revised revenue procedure which provides for an election that will facilitate the substitution of some or all of the debt instruments from two or more outstanding issues of debt with debt instruments from a new issue. The new debt and the old debt must be publicly traded. Under the election, taxpayers can treat a substitution of debt instruments, in certain circumstances, as a realization event for federal income tax purposes even though it does not result in a significant modification under Treas. Reg. § 1.1001-3 (and, therefore, is not an exchange for purposes of Treas. Reg. § 1.1001-1(a)). Under this revenue procedure, taxpayers do not recognize any realized gain or loss on the date of the substitution. Instead, the gain or loss generally is taken into account as income or deductions over the term of the new debt instruments. **Rev. Proc. 2001-21, I.R.B. 2001-__**.

HEDGES. The IRS has issued proposed regulations which revise the hedging regulations to reflect changes made by the Ticket to Work and Work Incentives Improvement Act of 1999. **66 Fed. Reg. 4738 (Jan. 18, 2001), *amending* Treas. Reg. § 1.1221-2**.

IRA. The taxpayers, husband and wife, filed a joint return for 1997. The husband was employed but the employer did not provide any employee pension plan. The wife was also employed in 1997 and her employer provided an employee pension plan. However, the wife's interest in the pension plan was not vested because the plan provided for vesting only after five years of employment. The husband contributed $2000 to an IRA and claimed the contribution as a deduction from gross income on the joint return which claimed adjusted gross income in excess of $50,000. The court held that the taxpayers were not entitled to the $2,000 deduction because the wife was enrolled in a qualified pension plan, even though the wife's interest was not yet vested. Note, after 1997, the adjusted gross income amount limit for married taxpayers has been increased to $150,000. The case is reported as a Tax Court Summary opinion which is not reviewable by another court and cannot be used as precedent. See I.R.C. § 7463. **Brandkamp v. Comm'r, T.C. Summary Op. 2001-5**.

PARTNERSHIPS-*ALM* § 7.03.*

ADMINISTRATIVE ADJUSTMENTS. The taxpayer had been a partner in a partnership which dissolved. The IRS audited the partnership's final return as to discharge of indebtedness income. The partnership had not designated a tax matters partner; therefore, the IRS chose one partner as the TMP. That partner signed two extensions for tax assessments. The IRS eventually issued a Final Partnership Administrative Adjustment (FPAA) which assessed discharge of indebtedness income against the partnership. The taxpayer did not receive notice of the audit, TMP designation or FPAA and challenged the final assessment as time barred because of the failure to give notice of these proceedings. The Tax Court held that it did not have jurisdiction over this claim because the issues involved partnership level proceedings and this case was brought by the individual taxpayer. **Overstreet v. Comm'r, T.C. Memo. 2001-13**.

The taxpayer was a partner in a partnership and filed for bankruptcy. The taxpayer did not elect to end the taxpayer's tax year on the date of the petition but the partnership split the taxpayer's distributive share of partnership net operating losses between the taxpayer, for the part of the year prior to the filing for bankruptcy, and the bankruptcy estate, for that part of the year post-petition. The IRS disallowed the taxpayer's share of the partnership NOLs, arguing that the NOLs were properly reported only by the bankruptcy estate. The taxpayer argued that the matter had to be handled in a partnership level proceeding. The court held that, because the partner and bankruptcy estate were essentially the same partner, the determination of the allocation of the NOLs was a partner-level matter which did not need a TEFRA administrative proceeding at the partnership level. The court also held that the taxpayer's share of partnership NOLs was allocated entirely to the bankruptcy estate because the NOLs were considered distributed at the end of the partnership tax year which occurred after the filing of the bankruptcy petition. **Katz v. Comm'r, 116 T.C. No. 2 (2001)**.

TERMINATION. A partnership terminates for tax purposes under I.R.C. § 708(b)(1)(B) as a result of the sale or exchange of 50 percent or more of the total interest in partnership capital and profits within a 12-month period. The regulations under Section 708(b) were modified in 1997 to provide that following the termination of a partnership, the terminated partnership is deemed to contribute all its assets and liabilities to a new partnership in exchange for an interest in the new partnership; and, immediately thereafter, the terminated partnership distributes interests in the new partnership to the purchasing partner and the other remaining partners in proportion to their respective interests in the terminated partnership in liquidation of the terminated partnership. The IRS has stated that when a partnership terminates under I.R.C. § 708(b)(1)(B) and continues as a new partnership, the terminated partnership must file a short year final tax return for its taxable year beginning after the date of termination of the terminated partnership. The new partnership is required to file a return for its taxable year beginning after the date of termination of the terminated partnership. **Notice 2001-5, I.R.B. 2001-__.**

PASSIVE ACTIVITY LOSSES. The taxpayer was CEO and shareholder in a C corporation which provided physician networks for insurance companies. The taxpayer sold the stock and formed an LLC which provided networks of physicians who provided alternative medical care, also for insurance companies. The LLC was formed in November of 1994. The taxpayer treated the taxpayer's share of LLC 1994 net operating losses as ordinary losses but the IRS argued that the losses were passive activity losses because the taxpayer had limited liability in the LLC. Treas. Reg. § 1.469-5T(a) provides seven tests for

determining whether a member of an entity materially participated in the business of the entity. The IRS argued that the taxpayer, as a limited liability member of the LLC, had to meet tests 1, 5 or 6 of the regulations because they applied to limited partners. However, the court held that, because there was no authority for treating LLC members as limited partners, the taxpayer could be considered as materially participating if the taxpayer met any of the seven tests used for general partners. The court held that the taxpayer met the first test, requiring the taxpayer to have spent more than 500 hours at the activity, because the taxpayer's time spent at the business of the C corporation could be grouped with the time spent at the business of the LLC. The court noted that the two businesses were closely related in that the taxpayer intended to use the same network system for alternative care physicians as was used to establish the network of traditional care physicians. **Gregg v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,169 (D. Or. 2000)**.

PENSION PLANS. The IRS has issued proposed regulations which provide a uniform (and, arguably simplified) procedure for minimum required distributions from employee pension plans. A table is to be used to determine the minimum distribution required during their lifetime. **Prop. Treas. Reg. § 1.401(a)(9)-5, Q&A 4 (26.2 years for those age 70, up to 1.8 years for those 115 and older)**.

This simplifies the calculation of the required minimum distribution because employees are no longer required to determine their beneficiary by the required beginning date. Employees do not have to decide whether to recalculate their life expectancy each year in determining required minimum distributions. It is no longer necessary to satisfy a separate incidental death benefit rule.

The required minimum distribution during the employee's lifetime can be calculated without regard to the beneficiary's age, except where required distributions could be reduced by taking into account the age of a beneficiary who is a spouse more than 10 years younger than the employee. The beneficiary is allowed to be determined as late as the end of the year following the year of the employee's death. The calculation of post-death minimum distributions can take into account an employee's remaining life expectancy at the time of death which allows distributions in all cases to be spread over a number of years after death.

For distributions from an individual account, the required minimum distribution is determined by dividing the account balance by the distribution period. **Prop. Treas. Reg. § 1.401(a)(9)-5, Q&A 1.** An exception applies if the employee's sole beneficiary is the employee's spouse who is more than10-years younger than the employee, in which case the employee is allowed to use the longer distribution period measured by the joint life and last survivor life expectancy of the employee and spouse. **Prop. Treas. Reg. § 1.401(a)(9)-5, Q&A 5**.

Generally, the designated beneficiary is determined as of the end of the year following the year of the employee's death rather than as of the employee's required beginning date or date of death. **Prop. Treas. Reg. § 1.401(a)(9)-4, Q&A 4**. Any beneficiary eliminated by the distribution of the benefit or through disclaimer during the period between the employee's death and the end of the year following the year of death is disregarded in determining the employee's designated beneficiary for purposes of calculating the required minimum distribution. ***Id***.

If, at the end of the year following the year of the employee's death there is more than one designated beneficiary and the account or benefit has not been divided into separate accounts or shares for each of them, the beneficiary with the shortest life expectancy would be the designated beneficiary. The determination of the designated beneficiary and the calculation of the beneficiary's life expectancy are generally contemporaneous with the commencement of the required distributions to the beneficiary. Prior beneficiary designations are irrelevant for distributions from individual accounts unless the employee takes advantage of a lifetime distribution period measured by the joint life expectancy of the employee and a spouse more than 10 years younger than the employee.

For an employee with a designated beneficiary, the same rules apply for distributions after the employee's death regardless of whether the death occurred before or after the employee's required beginning date. For an employee who elects or defaults into recalculation of life expectancy and dies without a designated beneficiary, the requirement is eliminated that the employee's entire remaining account balance must be distributed in the year after death. Instead, a distribution period equal to the employee's remaining life expectancy recalculated immediately after death applies. The default rule is changed in the case of death before the employee's required beginning date for a nonspouse designated beneficiary from the five-year rule of I.R.C. § 401(a)(9)(B)(ii) to the life expectancy rule of I.R.C. § 401(a)(9)(B)(iii). **Prop. Treas. Reg. § 1.401(a)(9)-3, Q&A 1**. Absent a plan provision or election of the five year rule, the life expectancy rule applies in all cases in which the employee has a designated beneficiary.

The designated beneficiary for determining the distribution period for annuity payments generally is the beneficiary as of the annuity starting date, even if that date is after the required beginning date. **Prop. Treas. Reg. § 1.401(a)(9)-6**. A beneficiary of a trust is allowed to be an employee's designated beneficiary for purposes of required minimum distributions when the trust is named as the beneficiary of a retirement plan or IRA if the requirements are met. **Prop. Treas. Reg. § 1.401(a)(9)-4(c), Q&A 5**. Documentation of the underlying trust beneficiaries must be provided in a timely manner to the plan administrator. ***Id***.

A former spouse to whom all or a portion of the employee's benefit is payable pursuant to a QDRO is treated as a spouse, including a surviving spouse, of the employee for purposes of the minimum distribution incidental benefit. The proposed regulations clarify that the surviving spouse of a deceased IRA owner could elect to treat an inherited IRA as the spouse's own IRA. Except for the required minimum distribution for the year of the individual's death, the spouse is permitted to roll over the post-death required minimum distribution for a year if the IRA rollover account is established in the spouse's name as owner.
If the surviving owner is age 70 1/2 or older, the minimum lifetime distribution would have to be made for the year and, as a required minimum distribution, the amount would be ineligible for rollover.

The proposed regulations are applicable for calendar years beginning on or after January 1, 2002. For 2001, taxpayers may rely on the new or old regulations. **66 Fed. Reg. 3954 (January 17, 2001).**

RETURNS. The IRS has published a revised Publication 51, Circular A, Agricultural Employer's Tax Guide. Theis document is available at no charge (1) by calling the IRS's toll-free

telephone number, 1-800-829-3676; (2) via the internet at http://www.irs.gov/prod/cover.html; (3) through FedWorld; or (4) by directly accessing the Internal Revenue Information Services bulletin board at (703) 321-8020.

S CORPORATIONS-*ALM* § 7.02[3][c].*

DISCHARGE OF INDEBTEDNESS. After ruling in *Gitlitz v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,147 (S. Ct. 2001),* see p. 15 *supra*, the U.S. Supreme Court granted certiorari, vacated and remanded the following cases involving the same issues: **Gaudiano v. Comm'r, 216 F.3d 524 6th Cir. 2000)**, see 11 *Agric. L. Dig*. 110; **Witzel v. Comm'r, 200 F.3d 496 (7th Cir. 2000), aff'g in part, T.C. Memo. 1999-64**, see 11 *Agric. L. Dig*. 21.

SAFE HARBOR INTEREST RATES
February 2001

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	5.18	5.11	5.08	5.06
110 percent AFR	5.70	5.62	5.58	5.56
120 percent AFR	6.22	6.13	6.08	6.05
		Mid-term		
AFR	5.07	5.01	4.98	4.96
110 percent AFR	5.59	5.51	5.47	5.45
120 percent AFR	6.10	6.01	5.97	5.94
		Long-term		
AFR	5.48	5.41	5.37	5.35
110 percent AFR	6.04	5.95	5.91	5.88
120 percent AFR	6.60	6.49	6.44	6.40

Rev. Rul. 2001-7, I.R.B. 2001-7.

TAX SHELTERS. The taxpayer, a professor of international marketing and an owner of several businesses, invested in a partnership which developed and operated jojoba farms. The taxpayer claimed tax losses more than double the initial investment in the first tax year and additional losses in following years. The losses were disallowed because the partnership was held to be a sham tax shelter. The issues in this case were whether the taxpayer was liable for the negligence component of the accuracy-related penalty and whether the IRS should have waived the understatement of tax component of the accuracy-related penalty. The court ruled that the taxpayer had sufficient business acumen that it was unreasonable for the taxpayer to not have sought expert tax advice before claiming substantial and accelerated tax losses more than double the initial investment. The taxpayer also failed to provide any substantial authority for their claim of losses. **Harvey v. Comm'r, T.C. Memo. 2001-16; Hunt v. Comm'r, T.C. Memo. 2001-15.**

WITHHOLDING TAXES. The taxpayer's employer withheld FICA and income tax from the taxpayer's wages during 1992 but did not pay that amount to the IRS. The taxpayer was assessed the taxes plus interest and penalties and filed for a refund. The court held that the taxpayer was entitled to credit for the amounts withheld but not paid and was entitled to the refund of the taxes, interest and penalties paid. **Winter v. United States, 2001-1 U.S. Tax Cas. (CCH) ¶ 50,182 (S.D. Tex. 2000), *aff'g*, 2000-2 U.S. Tax Cas. ¶ 50,780 (Magis. D. Tex. 2000)**.

LANDLORD AND TENANT

SALE OF LEASED LAND. The defendants leased farm land under a lease which terminated in December 1996. The lease permitted the defendants to harvest, in the summer of 1997, a winter wheat crop planted in the fall of 1996. The landlord had granted a security interest in the farm which was foreclosed after the landlord defaulted on the underlying loan. The farm was sold at a foreclosure sale to the plaintiffs who were not aware of the lease. The defendants harvested the winter wheat and the plaintiffs sought recovery of the crop. The court held that the foreclosure sale terminated the lease because the plaintiffs were not aware of the lease when they purchased the farm. The defendants, however, were allowed to receive so much of the crop as would compensate them for the planting, cultivating and harvesting the crop. **Elrick v. Merrill, 10 P.3d 689 (Colo. Ct. App. 2000)**.

SECURED TRANSACTIONS

CONSERVATION RESERVE PROGRAM. The debtor had granted a creditor a security interest in all "contracts, and all other general intangibles, including but not limited to Government Diversion, Deficiency, & CRP payments." The debtor argued that the CRP payments for a portion of the debtor's farm were not covered by the security interest because the CRP payments were rent. The court held that the CRP payments were accounts or contracts rights and not rent because none of the usual indicia for a landlord/tenant relationship were involved. The case did not discuss why the specific mention of CRP payments in the security agreement and financing statement was not sufficient to create a security interest in the CRP payments. ***In re* Isenbart, 255 B.R. 62 (Bankr. D. Kan. 2000)**.

COOPERATIVE RETAIN CERTIFICATES. The debtor was a member of a cooperative and owned capital retain certificates in the cooperative. The certificates were restricted as to redemption in that the cooperative board of directors determined when the certificates would be paid to the members. The cooperative bylaws also prohibited granting a security interest in the certificates without prior permission of the cooperative board of directors. The debtor had granted a security interest in the debtor's accounts, chattel paper, general intangibles and farm products and equipment. Under New Mexico law, N.M. Stat. § 55-9-318(4), an account debtor may not prohibit by contract the granting of a security interest in a general intangible for money due or become due. The court held that the cooperative was an account debtor and that the capital retain certificates were general intangibles; therefore, the prohibition in the bylaws against granting security interests in the certificates was void and the security interest attached to the certificates. ***In re* Van Tol, 255 B.R. 57 (Bankr. 10th Cir. 2000)**.

CITATION UPDATES

Benci-Woodward v. Comm'r, 219 F.3d 941 (9th Cir. 2000) (court awards and settlements) see p. 117 *supra*.

St. Charles Investment Co. v. Comm'r, 232 F.3d 773 (10th Cir. 2000), *rev'g*, 110 T.C. 46 (1998) (passive activity losses) see 11 *Agric. L. Dig*. p. 190.

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