CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

PERMISSIVE USE. The plaintiff had purchased the disputed land and relied on the seller's claim that the land extended up to a fence; however, the plaintiff's deed line stopped some 200 feet from the fence. The plaintiff used the property to pasture livestock and built some sheds on the property. The defendant's predecessor in interest had purchased the neighboring land from the same seller but the buyer had a survey performed which showed that the plaintiff's fence was 200 feet onto the defendant's property. The buyer confronted the plaintiff about the problem with no agreement, except that the buyer stated that the plaintiff's use was with the buyer's permission. The court held that the plaintiff had demonstrated sufficient hostile possession and open use of the disputed land to support title by adverse possession. The court also held that the buyer's mere statement of permission was insufficient to make the plaintiff's use permissive. **Rice v. Pritchard, 611 So.2d 869 (Miss. 1992)**.

BANKRUPTCY

GENERAL

ESTATE PROPERTY-*ALM* § 13.03[4].* The debtor was a beneficiary of a testamentary trust established by the will of the debtor's father. The trust first provided for income and principal to be distributed solely for the debtor's sister's education with any remaining funds to be distributed to the debtor at the trustee's sole discretion. The court held that the debtor's interest in the trust was not estate property because the trust was a spendthrift trust. ***In re* Esterson, 150 B.R. 72 (Bankr. M.D. Fla. 1993)**.

The debtor owned an interest in an employee award plan under which the debtor received annual awards of stock in the employer corporation. Each award was not vested until five years after the award and then the award was only 50 percent vested with an additional 10 percent vesting for each of the next five years. The debtor could receive the full awarded amount upon death or retirement but could receive only the vested amount if employment was terminated. The debtor was employed at the time of the bankruptcy filing. The court held that the debtor's vested amount was estate property. The court recognized a problem with collecting the additional vesting amounts over the life of the plan and suggested that the trustee recover the current fair market value of the right to receive the future vested amounts. ***In re* Carey, 150 B.R. 196 (Bankr. N.D. Ohio 1992)**.

EXEMPTIONS-*ALM* § 13.03[4].

AVOIDABLE LIENS. The debtors claimed a homestead exemption for a house with a fair market value of $95,000 and subject to a mortgage of $98,000. The debtors sought to avoid an additional judgment lien of $50,000 as impairing their exemption. The court held that the judgment lien was void under Section 506 because the lien was totally unsecured. The court distinguished the case from *Dewsnup v. Timm, 112 S. Ct. 773 (1992)*, because the lien involved in this case was not consensual as in *Dewsnup*. ***In re* Cullen, 150 B.R. 1 (Bankr. D. Me. 1993)**.

The debtors claimed joint homestead exemptions totaling $15,000 on their residence. The residence had a fair market value of $221,000 and was subject to consensual mortgages totaling $291,000. The debtors sought to avoid two additional judgment liens as impairing their exemptions. The debtors' plan included payment of the mortgages. The court held that because the judgment liens would impede the debtors' fresh start and ability to retain their home, the judgment liens could be avoided. **Matter of LaPointe, 150 B.R. 92 (Bankr. D. Conn. 1993)**.

RETIREMENT PLAN. The debtor had two Keogh retirement plans for the debtor and the debtor's employees; however, the debtor failed to make any contributions for the employees as required by ERISA. The court held that because the plans were not ERISA qualified, the plans were not subject to the anti-alienation provisions of ERISA and were included in the bankruptcy estate. ***In re* Lane, 149 B.R. 760 (Bankr. E.D. N.Y. 1993)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT-*ALM* § 10.05[2]. From November 1991 through March 1992, the debtor had purchased agricultural commodities from producers without fully paying for the produce. In March 1992, a bank creditor offset the debtor's funds in a bank account against amounts owed to the bank. The producers sought recovery of the offset funds because the offset violated the PACA trust. The bank argued that because it had no knowledge of the PACA trust, under Restatement of Trusts § 284(1), the offset funds were no longer subject to the PACA trust. The producers argued that the existence of the PACA trust statute was sufficient notice to remove the bank from bona fide receiver status under the Restatement rule. The court held that in order for the setoff funds not to be subject to the PACA trust, the creditor must show that (1) it had no actual knowledge of the trust fund or that the offset violated the trust fund provisions and (2) the creditor gave consideration for the offset. ***In re* H.R. Hindle & Co., Inc., 149 B.R. 775 (Bankr. E.D. Pa. 1993)**.

CHAPTER 12

DISMISSAL-*ALM* § 13.03[8][d]. The debtors voluntarily dismissed their Chapter 12 case. The trustee was in possession of funds received from the sale of cattle and requested court permission to pay the taxes on the sales and to pay trustee fees. The FmHA, a creditor, filed an objection to the trustee's request and obtained from the District Court an ex parte prejudgment writ of attachment of the funds held by the trustee. A U.S. Marshall took possession of the funds under the attachment. Although holding that the Bankruptcy Court retained jurisdiction over estate property after dismissal, the court held that because the Bankruptcy Court serves under the District Court, the Bankruptcy Court would not make any ruling in this case and suggested that the trustee seek redress from the District

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Court. ***In re*** **Ethington, 150 B.R. 48 (Bankr. D. Idaho 1993).**

PLAN-*ALM* § 13.03[8][c]. Prior to the debtor's filing for Chapter 12, a creditor obtained a foreclosure judgment on a mortgage against the debtor's farm land but no foreclosure sale had yet occurred at the time of the filing. The debtor's plan included payment of the debt by restructuring the debt over the life of the plan. The creditor objected to the plan, arguing that the mortgage loan could not be restructured because the loan was merged into the foreclosure judgment, leaving no loan to be restructured. The court distinguished this case from *In re McKinney, 84 B.R. 748 (Bankr. D. Kan. 1987)* where a foreclosure judgment and sale had occurred prior to the bankruptcy filing. The court held that because no sale had occurred, the debtor retained ownership of the land subject to the judgment lien which was an allowed secured claim. Because allowed secured claims may be modified by a Chapter 12 plan under Sections 1222(b)(2), (9), 1225(a)(5), the plan could restructure the debt. ***In re*** **Bland, 149 B.R. 977 (Bankr. D. Kan. 1992)**.

CHAPTER 13

PLAN-*ALM §* 13.03[5]. Two creditors objected to the debtor's Chapter 13 plan as not in the best interest of the creditors because the plan did not include the debtor's rural homestead in the value of property which would be distributed to creditors in a Chapter 7 liquidation. The debtor claimed the homestead as exempt and the creditors had failed to object timely to the exemption. The creditors' objection to the exemption was that the homestead was partnership property which the debtor could not claim as an exemption under state or federal law. The court held that the exemption was allowed because the creditors did not timely object to the exemption; therefore, the homestead was excluded from the property which would be distributed in a liquidation and the plan was confirmable. ***In re*** **Alderman, 150 B.R. 246 (Bankr. D. Mont. 1993)**.

FEDERAL TAXATION

AVOIDABLE LIENS. Prior to the bankruptcy filing, the IRS assessed, under I.R.C. § 6321, taxes for 1979 through 1983 and had filed a Notice of Federal Tax Lien (NFTL) as to the assessments except for 1983. The debtor-in-possession sought to avoid the liens as a bona fide purchaser under Section 545(2) and I.R.C. § 6323(b). The court held that the lien for which no NFTL was filed could be avoided as to the debtor's real and personal property. The court also held that the tax lien for which an NFTL was filed was avoidable as to the debtor's money, bank accounts, retirement accounts, stock and motor vehicle. ***In re*** **Znider, 150 B.R. 239 (Bankr. C.D. Cal. 1993)**.

CLAIMS. The IRS filed a timely claim for taxes, listing each item as estimated. Over one year later and after the bar date for claims, the IRS amended the claim, increasing the amount of the claim by $300,000. The court denied the increase in the claim because the IRS gave no reason for the delay and the trustee and creditors had relied on the original IRS claim in lengthy and expensive litigation which would not have occurred if the amount of the original claim had been closer to the amended claim. ***In re*** **Tanaka Bros. Farms, Inc., 150 B.R. 55 (Bankr. D. Colo. 1993)**.

JURISDICTION. The debtor was a corporation in Chapter 7. The plaintiff was a former officer of the debtor and had been assessed the I.R.C. § 6672 penalty as a responsible person in a company which failed to pay withholding taxes for its employees. The plaintiff sought a judgment by the Bankruptcy Court as to liability for the taxes. The court held that it had no jurisdiction over federal tax issues involving a nondebtor where the nondebtor's tax liability would not affect the reorganization ability of the debtor. ***In re*** **Malone Properties, 150 B.R. 160 (Bankr. S.D. Miss. 1993)**.

PLAN-*ALM* § 13.03[7]. At the confirmation hearing, the IRS agreed to confirmation of the plan which included the following provisions: (1) the debtors were to file income tax returns for 1984-1986, (2) after the filings, the IRS had 90 days to file additional claims for those years, and (3) after additional claims were filed, the debtors had 180 days to file objections to the claims. The plan was confirmed and the debtors filed their 1984-86 returns. The IRS filed a claim for no tax due for 1984-86. Two and one-half years later, the IRS assessed the debtors $110,000 for 1984-86 and filed a Notice of Intent to Levy for the taxes plus penalties and interest. The debtors sought an injunction against the levy. The IRS argued that because the taxes were nondischargeable, the confirmed plan was not binding and that any injunction was prohibited by the Anti-Injunction Act. The court held that the IRS was bound by its agreement and the confirmed plan and that the IRS could be enjoined from violating that agreement because the IRS had voluntarily entered the agreement and a breach of the agreement would interfere with the orderly administration of the bankruptcy estate. ***In re*** **Martin, 150 B.R. 43 (Bankr. S.D. Cal. 1993)**.

POST-PETITION PENALTIES. The IRS had filed a claim for pre-petition taxes, interest and penalties, including penalties for failure to pay the taxes post-petition. The court held that the IRS could not assess failure to pay penalties on pre-petition taxes for the period during the Chapter 13 case. ***In re*** **Quick, 93-1 U.S. Tax Cas. (CCH) ¶ 50,166 (Bankr. W.D. Va. 1993)**.

PRIORITY-*ALM* § 13.03[5]. The debtor provided no creditor notice of the bankruptcy case to the IRS because the debtor had no knowledge of an IRS claim. The IRS filed a claim after the bar date for taxes and interest. The debtor filed an objection to the claim. The IRS moved to have the claim declared timely and allowed as a priority. The court held (1) under Bank. Rule 3002(c), the claim was untimely and ineligible for any exception, (2) the claim was allowed, except to the extent the debtor's objection was successful, because no statutory provision denied allowance of a claim for untimeliness, and (3) the IRS claim was entitled to the priority provided by Section 726, subject to the equitable subordination powers of the court under Section 510. ***In re*** **Rago, 149 B.R. 882 (Bankr. N.D. Ill. 1992)**.

TAX LIENS. In January 1988, a creditor obtained a prejudgment attachment against the debtor's real property and in August 1989, the creditor obtained a judgment against the debtor. In November 1989, the IRS filed a Notice of Tax Lien against all of the debtor's property. In December 1989, the creditor recorded the judgment against the debtor. Under Conn. Gen. Stat. § 52-380a, the recording of a judgment against real property within four months after the judgment perfected the lien as of the date of attachment; thus, the creditor claimed that its lien was considered perfected prior to the filing of the IRS tax lien. Although the IRS recognized that *Hartford Provision Co. v. U.S., 579 F.2d 7 (2d Cir. 1978)* held that a recording of a judgment which caused a retroactive perfection of the judgment lien was effective, the IRS argued that the case applied only to judgments against personal property. The court held that the holding in *Hartford* could not be restricted only to personal property and held that the creditor's lien had priority. ***In re* Anderson, 150 B.R. 86 (D. Conn. 1993)**.

CONTRACTS

FORUM CLAUSE. The plaintiff was a Massachusetts company which sold Christmas trees grown by the defendant in Washington. After the defendant visited the plaintiff, the defendant sent a signed order to the plaintiff for 1600 trees at a set price to be shipped by four trucks. The contract stated that actions involving the contract could be brought only in Washington. The plaintiff changed the number of trees and the number of shipments, signed the amended contract and returned the contract to the defendant. The plaintiff later sent the required deposit. The defendant sent the lower number of trees but the plaintiff refused to make full payment because of the poor condition of the trees. The plaintiff brought suit in Massachusetts for breach of contract and the defendant moved to dismiss the case for improper venue under the contract. The plaintiff argued that the original contract was not effective because the changes were only a counteroffer. The court held that the contract was ratified by the plaintiff sending the deposit and the defendant sending the ordered trees as per the changes made by the plaintiff; therefore, the forum selection clause was binding and the case was properly dismissed for improper venue. **Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993)**.

FEDERAL AGRICULTURAL PROGRAMS

BORROWER'S RIGHTS-*ALM* § 11.01[2][g]. The debtors defaulted on a mortgaged loan from the defendant FLB and the FLB commenced foreclosure proceedings in May 1987. After delays required by several bankruptcy filings, a hearing was held in February 1988 in which the debtors argued that the Agricultural Credit Act of 1987 prevented the FLB from seeking foreclosure until the debtors had been offered restructuring of the loan. The court held that the debtor had no private right of action to enforce the 1987 Act and that the 1987 Act did not automatically bar a state foreclosure action. **Speck v. Federal Land Bank of Omaha, 494 N.W.2d 628 (S.D. 1993)**.

COTTON-*ALM* § 10.03[3]. The CCC has adopted as final regulations amending the price support loan program regulations for cotton, amending several administrative provisions and eligibility requirements. **57 Fed. Reg. 40593 (Sept. 4, 1992)**.

GUARANTEED LOANS-*ALM* § 11.01[1][a]. The FmHA has adopted as final amendments to the insured and guaranteed soil and water loan regulations to conform the regulations to FACT 1990. The amendments limit loan purposes to soil and water conservation and protection, permit the use of insured loans, and restrict the amount of individual loans. **58 Fed. Reg. 15071 (March 19, 1993)**.

NATIONAL FORESTS-*ALM* § 11.04. The plaintiffs sought judicial review of a Forest Service land and resource management plan for the Ouachita National Forest. In upholding the plan, the court held that the issuance of the plan and a "vegetation management program pursuant to a record of decision" as separate documents was allowed. The court also held that the plan's method of choosing harvesting techniques site-by-site was allowed under 16 U.S.C. § 1604(g)(3)(F)(i). **Sierra Club v. Robertson, 810 F. Supp. 1021 (W.D. Ark. 1992)**.

PAYMENT LIMITATIONS-*ALM* § 10.03[3][b][i]. The plaintiffs had formed a farm partnership composed of nine individuals and nine corporations. The partnership submitted a 1988 Farm Operating Plan as part of an application for participation in the 1988 price support and adjustment program. Under the plan most partners would contribute $13,000, but two partners contributed either part management services and part cash or all management services equal to $13,000. The plan was approved by the county committee which ruled that the partners all qualified as separate "persons" for purposes of the $50,000 payment limitation. Not included in the plan was a loan to the partnership from one of the partners. The loan was repaid during 1988 at a market rate of interest. At the end of the crop year, the plan was reviewed by the county committee which ruled that the partnership had violated its plan and was only qualified as one person for payment limitation purposes. The ruling was affirmed by DASCO which stated three grounds for the determination: (1) the partnership failed to meet the 30 percent capitalization requirement of the ASCS handbook, (2) the loan from the partner violated the financing requirements of the handbook, and (3) the two partners who did not provide $13,000 in money did not provide services commensurate with their claimed share of the partnership proceeds. DASCO conceded the first issue on appeal. The plaintiffs also argued that the county determination was a final ruling not reviewable by DASCO after the 15 day appeal limit had passed. The court held that county committee decisions are always reviewable. The court also held that because DASCO made no finding that the two partners did not make the contributions in money or services as indicated by the operating plan, the second ruling was improper. The court noted substantial evidence that such contributions were made. As to the loan made by the partner to the partnership, the court held that the regulations do not prohibit bona fide loans from partners to partnerships and that only the handbook provides that such loans disqualify the partner from being treated as a separate "person." Because the handbooks are not established by notice and comment procedures under the Administrative Procedures Act, the handbook provisions cannot be the sole basis for the ruling. Therefore, because the loan was not prohibited by the regulations, the partners could not be denied separate "person" status on the basis of the loan. The plaintiffs were granted summary judgment. **Jones v. Espy,**

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Civ. Action No. 90-2831-LFO (D. D.C. 1993)(case submitted by Alexander Pires, counsel for plaintiffs).

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PRICE SUPPORT LOANS-*ALM* 10.03[2]. The CCC has issued interim rules amending the regulations for the price support loan programs for grains and similarly handled commodities. The amendments relate primarily to administrative provisions and eligibility requirements. **58 Fed. Reg. 14495 (March 18, 1993)**.

FEDERAL ESTATE AND GIFT TAX

GENERATION SKIPPING TRANSFER TAX-*ALM* § 5.04[6]. The taxpayer had a married daughter who had a son. The daughter died and the surviving spouse remarried with the new spouse adopting the son. Under state law, the adoption made the son no longer the child of the deceased daughter. The IRS ruled that upon the death of the daughter, under I.R.C. § 2612(c)(2), the daughter's son was no longer a skip person and the adoption did not change that result. **Ltr. Rul. 9310005, Dec. 7, 1992**.

The taxpayers were husband and wife and executed identical revocable trusts. The trusts provided that upon the first death of a spouse, that decedent's trust assets passed to three trusts: a family trust, a QTIP trust and a reverse QTIP trust. The family trust was to receive only property equal to the decedent's remaining unified credit, with the remaining property passing to the QTIP trusts. The reverse QTIP trust was to receive property equal in value to the decedent's GST exemption amount, with the regular QTIP trust receiving the remaining property after the family trust and the reverse QTIP trust. The trusts also provided that any death taxes attributable to the QTIP trusts were to be paid only from the regular QTIP trust. The IRS ruled that the funding of the trusts would not effect the eligibility of the trusts for QTIP or reverse QTIP treatment. The IRS also ruled that the tax payment requirement did not affect the effectiveness of the reverse QTIP trust to treat the first decedent spouse as transferor of the trust property for GSTT purposes. **Ltr. Rul. 9310008, Dec. 9, 1992**.

GIFT-*ALM* § 6.01. The decedent made several gifts by checks dated, delivered and deposited in December 1985. However, the checks were not paid by the drawee bank until January 1986. The court held that the date of the gifts was in 1985 under the relation back doctrine which applied in this case because the checking account had sufficient funds at all times to cover the checks and the checks were unconditionally delivered to the donees who cashed the checks within a reasonable period of time. **Est. of Metzger v. Comm'r, 100 T.C. No. 14 (1993)**.

MARITAL DEDUCTION-*ALM* § 5.04[3]. The decedent's will passed to the surviving spouse an interest in trust in estate property. The trust provided for at least quarterly payments of all trust income and no person could appoint the property to someone other than the surviving spouse. The executor timely filed Form 706 but instead of listing on Part 2 of Schedule M the surviving spouse's interest in the trust as property for which the QTIP election was made, the executor listed the individual trust assets. The IRS ruled that the surviving spouse's interest in the trust was eligible QTIP. The IRS also ruled that although Part 2 was incorrectly filled out, the QTIP election was effective because the executor included a copy of the will and all of the trust assets. **Ltr. Rul. 9310002, Nov. 5, 1992**.

The taxpayers, husband and wife, executed identical trusts. The trusts provided that upon the death of the first spouse to die, the decedent's share of marital property and the decedent's separate property passed to the surviving spouse's trust. The surviving spouse was to be a co-trustee with an independent co-trustee. A protector, an unrelated person, had the power to remove the non-family co-trustee and the protector could be removed only with the consent of all adult trust beneficiaries, except the surviving spouse. The trust also provided several restrictions on distributions to beneficiaries other than the surviving spouse. The IRS ruled that the trust interest passing to a surviving spouse would be QTIP. **Ltr. Rul. 9310012, Dec. 12, 1992**.

Under the decedent's will, executed in 1968, certain property passed to the surviving spouse unless the spouse elected to take the statutory share of the decedent's estate. If such an election was made, the residuary of the decedent's estate passed to trusts for the decedent's children with remainders to the decedent's grandchildren. The surviving spouse elected to take the statutory share. Within nine months after the decedent's death, the children disclaimed a portion of the residuary estate passing to them. The decedent's grandchildren, through guardians and court orders, disclaimed a portion of the interests passing to them because of the children's disclaimers. Under state law, the grandchildren's disclaimed interests passed to the surviving spouse. The IRS ruled that the property passing to the spouse under the statutory share and the various disclaimers was eligible for the marital deduction, and because the property all passed by intestacy and not the decedent's will, the marital deduction was not limited by the transition rules of ERTA 1981. **Ltr. Rul. 9310020, Dec. 14, 1992**.

TRANSFERS WITHIN THREE YEARS OF DEATH-*ALM* § 5.02[2].The decedent signed a power of attorney appointing a son as attorney-in-fact. The decedent made many gifts and other estate planning transactions up to the period of incompetency in March 1987. The son made several gifts from the decedent's property until the decedent's death in April 1987. In 1992, the state passed a law authorizing attorneys-in-fact to make gifts in accordance with the principal's history of lifetime gifts. The Court held that the state law applied retroactively and held that the late transfers were not included in the decedent's gross estate as revocable transfers. **Est. of Ridenour v. Comm'r, T.C. Memo. 1993-41**.

TRANSFERS WITH RETAINED INTERESTS-*ALM* § 5.02[3]. A husband and wife established an investment limited partnership in which the husband contributed $990,000 in exchange for a 1 percent general partnership interest and a 98 percent limited partnership interest. The wife contributed $10,000 in exchange for a one percent limited partnership interest. The general partner controlled the timing of distributions but the partnership interests represented each partner's share of partnership profits and losses and rights in partnership property upon dissolution. The husband transferred the 98 percent limited partnership interest by gift to the wife. The IRS ruled that the gift was eligible for the gift tax marital deduction. The IRS also ruled that the limited partnership interest was not included in the husband's gross estate because the general partner's control over distributions was limited by state fiduciary duty law. **Ltr. Rul. 9310039, Dec. 16, 1992**.

TRUSTS-*ALM* Ch. 8. The taxpayer established an irrevocable trust with the spouse as beneficiary of all trust income and corpus distributions. The taxpayer transferred the taxpayer's one-half interest in a residence to the trust and the trust provided that the spouse could live in the residence or require the trustee, the taxpayer, to exchange the property for another residence or for productive property. The other one-half interest was transferred to a revocable trust for the taxpayer. The spouse had a testamentary special power of appointment over trust property and could acquire trust property by purchase or exchange of property with the same fair market value. If the power of appointment was not exercised, the trust property passed to the taxpayer in trust. The IRS ruled (1) the spouse's interest was QTIP for gift tax purposes; (2) transfers of corpus from the trust to the spouse would not be considered additional taxable gifts; (3) if the special power of appointment was not exercised, the taxpayer would be treated as the owner of the trust; (4) upon the death of the spouse, the basis of trust property would be the value for estate tax purposes; (5) a sale of the residence was eligible for the nonrecognition of gain under I.R.C. § 121; (6) upon the spouse's death and non-exercise of the testamentary special power of appointment, the interest in the trust passing to the taxpayer was QTIP; and (7) if the spouse's estate does not make a QTIP election, the trust property will not be included in the taxpayer's estate. **Ltr. Rul. 9309023, Dec. 3, 1992**.

VALUATION-*ALM* § 5.02[3][a]. In 1987 a conservator of the taxpayer formed two partnerships with the conservator owning general and limited partnership interests and the taxpayer owning limited partnership interests. One partnership owned farm land and the other managed the land. The partnership agreements allocated the partnership operating profits and capital profits among the various partnership interests and provided compensation for the general partners. In 1989 the partnership agreement was amended to clarify that no gift was intended by the original partnership agreement and to provide for contributions by the conservator unless I.R.C. § 2036(c) was retroactively repealed. The taxpayer intended to transfer as a gift 49 percent of the taxpayer's limited partnership interest in the land partnership to the conservator and the conservator planned to substitute a wholly owned corporation as the general partners. The IRS ruled that the 1989 amendment did not subject the partnership to I.R.C. § 2703 because the amendments predated the effective date of the statute. The intended gift transfer and planned substitution of the corporation also did not subject the partnership to I.R.C. § 2703. **Ltr. Rul. 9310003, Dec. 4, 1992**.

The decedent and the decedent's predeceased brother had each been 50 percent shareholders in a private corporation. The shareholders signed an agreement for the corporation's purchase of a shareholder's stock upon the shareholder's death. The agreement provided for the shares to be valued at book value plus the proceeds of insurance policies on the life of the shareholder in excess of the policies' cash value. The book value was based on annual year-end audits. No evidence was presented that the buy-sell agreement or its amendments were intended as testamentary devices to escape estate tax. The court held that the decedent's estate's use of the buy-sell agreement value for the decedent's stock was allowed because the value accurately reflected the fair market value of the stock and the agreement was entered into at arms-length and was not intended to pass value in the corporation to the decedent's heirs without payment of estate tax. **Rudolph v. U.S., 93-1 U.S. Tax Cas. (CCH) ¶ 60,130 (S.D. Ind. 1993)**.

FEDERAL INCOME TAXATION

BAD DEBTS-*ALM* § 4.03[7]. The taxpayer purchased the entire stock of a corporation for $200,000 and personally guaranteed corporate loans made after the stock purchase. The total of the guaranteed loans exceeded $1 million but the debtor took only $30,000 in salary. The court held that the taxpayer failed to provide sufficient evidence that the dominant motive for the guaranty was the protection of the taxpayer's salary and not protection of the investment in the company; therefore, the taxpayer was entitled only to a personal bad debt deduction when the taxpayer was required to pay on the guarantees. **Garner v. Comm'r, 93-1 U.S. Tax Cas. (CCH) ¶ 50,167 (5th Cir. 1993), *aff'g*, T.C. Memo. 1991-569**.

COOPERATIVES-*ALM* § 14.03[2]. The taxpayer was a tax exempt agricultural dairy cooperative. In order to bring its production up to capacity, the taxpayer purchased milk from two other cooperatives, A and B. The taxpayer purchased milk directly from cooperative A which passed the proceeds back to its members under its cooperative agreement. The taxpayer purchased milk directly from the producer members of cooperative B but paid the proceeds to cooperative B which passed the proceeds on to the members under its cooperative agreement. The value of the milk purchased from A and B was less than the value of the milk processed by the taxpayer from its own producer members. Cooperatives A and B both sold only milk produced by its members. Citing *Rev. Rul. 69-651, 1969-2 C.B. 135*, the IRS ruled that the purchase of milk from cooperative A did not effect the taxpayer's tax exempt status because the taxpayer could "look through" cooperative A and treat the milk as coming directly from producers. Citing *Rev. Rul. 55-496, 1955-2 C.B. 268*, the IRS also ruled that the purchases from cooperative B did not affect the taxpayer's tax exempt status because cooperative B acted only as an agent of the producers. **Ltr. Rul. 9310028, Dec. 15, 1992**.

The IRS has revised *Rev. Rul. 72-602, 1972-2 C.B. 510* to remove the requirement that a cooperative must be doing at least 50 percent in value of its business with members. The IRS ruled that the factors in *Puget Sound Plywood, Inc. v. Comm'r, 44 T.C. 305 (1965), acq., 1966-1 C.B. 3* would

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be used in conjunction with all the facts and circumstances in determining whether a cooperative was doing business on a cooperative basis. **Rev. Rul. 93-21, I.R.B. 1993-13, 5**.

EMPLOYEE EXPENSES-ALM § 7.02[4]. The IRS has issued a revision of *Rev. Proc. 92-17*, *1992-1 C.B. 679*, providing rules for substantiation of employee lodging, meal and incidental expenses incurred while traveling away from home. The revision also includes an optional method for employees and self-employed persons in computing the deductible costs of business meal and incidental expenses incurred while traveling away from home. **Rev. Proc. 93-21, I.R.B. 1993-13**.

ENERGY CREDIT. The taxpayer installed a kaolin pipeline to transport kaolin from the mining site to the processing plant instead of using gas powered trucks. The court held that, although the pipeline saved considerable fuel, the energy tax credit was not available for substitution of one type of property for the less fuel efficient property. **J.M. Huber Corp. v. U.S., 93-1 U.S. Tax Cas. (CCH) ¶ 50,169 (Fed. Cl. 1993)**.

INTEREST RATE. The IRS has announced that for the period April 1, 1993 through June 30, 1993, the interest rate paid on tax overpayments remains at 6 percent and for underpayments remains at 7 percent. The interest rate for underpayments by large corporations remains at 9 percent. **Rev. Rul. 93-24, I.R.B. 1993-14**.

REFUND. The taxpayers claimed a share of partnership depreciation on their 1982 individual income tax return and reported gain from the sale of the partnership interest on their 1983 return. The taxpayers signed an extension of the period of limitation on assessments for their 1982 return and in 1989, the taxpayers were assessed additional taxes resulting from disallowance of some of the depreciation. In 1989, the taxpayers filed for a refund for 1983 based on less recognized gain resulting from an increase in the basis of the partnership interest due to the disallowance of the depreciation. Because the refund claim was untimely, the taxpayers sought the refund under the doctrine of equitable recoupment. The IRS ruled that the doctrine of equitable recoupment was not available to the taxpayers because the transactions involved were separate events occurring in different tax years. **Ltr. Rul. 9311002, Oct. 28, 1992**.

RETURN. The IRS has announced that Publication 917 "Business Use of a Car" on pages 6 and 7 uses the wrong figure in a sample calculation of depreciation and should start with the total cost and not the lesser business cost figure. **Ann 93-48, I.R.B. 1993-12, 21**.

The IRS has announced an error in IRS Pub. 534 "Depreciation" in that the percentages in the table on page 18 for the mid-quarter convention are in reverse order. **Ann. 93-50, I.R.B. 1993-13, 18**.

S CORPORATIONS- ALM § 7.02[3][c].

TRUSTS. The grantor established a trust which, upon the grantor's death, created a trust for the grantor's surviving spouse. Upon the death of the surviving spouse, the trust created separate trusts for the grantor's living lineal descendants, funded with S corporation stock. The separate trusts provided (1) at least quarterly distribution of all trust income; (2) distribution of corpus for the beneficiary's maintenance, support, health and education; (3) termination of the trust when a beneficiary reached age 22; and (4) passing of any remainder at the death of a beneficiary to the creditors of the beneficiary's estate, the beneficiary's surviving spouse and any lineal descendants. The IRS ruled that the separate trusts were QSST's. **Ltr. Rul. 9311020, Dec. 18, 1992**.

The decedent's predeceased spouse's will established a trust which held S corporation stock and qualified as a QSST. The trust provided that the trust was to terminate as soon as possible after the death of the decedent. The entire trust corpus was included in the decedent's gross estate and the decedent's estate elected to pay the estate tax by installments and sought a ruling that the trust would qualify as a QSST during the period of the administration of the estate during the years the estate tax was paid in installments. The IRS ruled that, under I.R.C. § 1361(c)(2)(A)(ii), the trust would qualify as a QSST only for two years after the death of the decedent. **Ltr. Rul. 9311025, Dec. 18, 1992**.

TAX LIENS. A creditor of the debtor obtained a judgment lien against the debtor's property, including after-acquired property. After that lien was perfected, the IRS filed a tax lien against the debtor's property, including after-acquired property. Subsequent to both liens, the debtor acquired additional property. The court held that although both liens became perfected at the same time as to the after-acquired property, the federal lien had priority because I.R.C. § 6323 provided that tax liens had priority over liens which became perfected after the filing of the tax lien. Because the judgment lien did not become perfected until after the tax lien was filed, the tax lien had priority. **U.S. v. McDermott, 93-1 U.S. Tax Cas. (CCH) ¶ 50,164 (S.Ct. 1993),** ***rev'g*****, 945 F.2d 1475 (10th Cir. 1991)**.

LANDOWNER'S LIABILITY

INVITEES-*ALM* § 1.02[1]. The plaintiff had paid the defendant $1 to fish in a pond on the defendant's property. While fishing, the plaintiff became bothered by fire ants on the property and after three hours of fishing and being bothered by the ants, fell and was injured while attempting to shake off some of the ants. The court held that the plaintiff was an invitee and the defendant was not liable for the injury because the plaintiff had knowledge of the fire ants for some time before becoming injured. **Fleming v. Arrington, 610 So.2d 1160 (Ala. 1992)**.

CITATION UPDATES

Matter of Toti, 149 B.R. 829 (E.D. Mich. 1993), ***rev'g*****, 141 B.R. 126 (Bankr. E.D. Mich. 1992)** (discharge) see p. 49 *supra*.

U.S. v. Hill, 113 S.Ct. 941 (1993), ***rev'g*****, 945 F.2d 1529 (Fed. Cir. 1991)** (alternative minimum tax) see p. 32 *supra*.

McMurray v. Comm'r, 985 F.2d 36 (1st Cir. 1993), ***rev'g*****, T.C. Memo. 1992-27** (charitable deduction) see p. 51 *supra*.

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MORTGAGES

ASSIGNMENT OF RENT. The plaintiff purchased farm land from the defendant by installment note. The note was secured by a purchase money mortgage (trust deed) and the parties executed an assignment of rents which included language that the assignment was intended as additional security for the note. The plaintiff rented the farm on a crop share basis to third parties. In October 1985, after the plaintiff defaulted on the note, the plaintiff received the proceeds of the sale of the plaintiff's share of the crop produced by the tenant. The defendant began foreclosure proceedings in January 1986 and a receiver was appointed in March 1986. The defendant claimed that the rent proceeds were subject to the assignment of rent agreement as a separate document which required no action by the defendant after the default of the plaintiff. The court held that because the note, mortgage and assignment agreement were executed at the same time as part of the same transaction, the documents were to be read together with the assignment of rents agreement functioning solely as additional security. Therefore, the defendant's right to the rents depended upon the procedures in the mortgage and did not arise until foreclosure was begun and a receiver appointed. The rent proceeds were held not subject to the assignment of rents agreement. **Lake County Trust Co. v. Two Bar B, Inc., 606 N.E.2d 258 (Ill. Ct. App. 1992)**.

ISSUE INDEX