12 Texas Instruments, Inc. v. Comm'r, T.C. Memo. 1992-306.
13 Rev. Rul. 83-146, 1983-2 C.B. 17.
14 Fox Photo, Inc. v. Comm'r, T.C. Memo. 1990-348.
15 Siler v. Comm'r, T.C. Memo. 1985-257.
16 Rev. Rul. 67-417, 1967-2 C.B. 49.
17 Estate of Morgan v. Comm'r, 448 F.2d 1397 (9th Cir. 1971).
18 Rev. Rul. 77-8, 1977-1 C.B. 3.
19 Rev. Rul. 80-151, 1980-1 C.B. 7.
20 Rev. Rul. 65-79, 1965-1 C.B. 26.
21 Treas. Reg. § 1.1031(a)-2(b)(2).
22 Rev. Proc. 87-56, 1987-2 C.B. 674.
23 See Treas. Reg. § 1.1031(a)-2(b)(3), Standard Industrial Classification Manual (SIC Manual), Office of Management and Budget (1987).
24 Treas. Reg. § 1.1031(a)-2(b)(1).
25 Treas. Reg. § 1.1031(a)-1(b).
26 Treas. Reg. § 1.1031(a)-1(c)(2).
27 Treas. Reg. § 1.1031(a)-2(a). See ns. 21-24 *supra*.
28 E.g., Texas Instruments, Inc. v. Comm'r, T.C. Memo. 1992-306.
29 Fox Photo, Inc. v. Comm'r, T.C. Memo. 1990-348.
30 Rev. Rul. 77-8, 1977-1 C.B. 3.
31 Rev. Rul. 65-79, 1965-1 C.B. 26.
32 See Rev. Rul. 77-8, 1977-1 C.B. 3.
33 See I.R.C. § 1245(a)(3)(B).
34 I.R.C. § 1031(a)(1).
35 See I.R.C. § 1245(a)(3)(B).
36 See Treas. Reg. § 1.1245-3(c)(1).
37 Treas. Reg. § 1.1031(a)-2(c).
38 Illinois Cereal Mills, Inc. v. Comm'r, 789 F.2d 1234 (7th Cir. 1986), *aff'g*, T.C. Memo. 1983-469.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXEMPTIONS

HOMESTEAD. The Chapter 13 debtor owned a one-half beneficial interest in a trust which owned two pieces of real property, one of which was used by the debtor as a principal residence. The interest in the trust had a fair market value of $24,000 and the debtor claimed $15,000 as exempt under Section 522(d)(1) as personal property used as a residence. The court held that the exemption was not allowed because (1) the debtor's property consisted only of the beneficial interest in the trust which was personal property, (2) Section 522(d)(1) required a debtor to live in the personal property claimed as a homestead, and (3) the debtor did not live in the beneficial interest in the trust. ***In re* Bowers, 222 B.R. 191 (Bankr. D. Mass. 1998)**.

CHAPTER 12-*ALM* § 13.03[8].*

CHAPTER 12 BANKRUPTCY EXPIRES

The Congress, on September 30, 1998, failed to take action to extend Chapter 12 bankruptcy. Therefore, the provision is not available after that date. In the last minute discussions on the topic, the House of Representatives refused to allow the Chapter 12 provision to be removed from the pending Bankruptcy Reform Bill. The pending legislation would make Chapter 12 a permanent part of the Bankruptcy Code. Some believe that the larger bill may pass before Congressional adjournment; others are less sure. In any event, those seeking bankruptcy protection after September 30 and until enactment of legislation on Chapter 12 will need to resort to other bankruptcy reorganization provisions, notably Chapters 11 and 13. See Harl, *Agricultural Law*, § 120.08[5][a] (1998); Harl, *Agricultural Law Manual*, § 13.03[8][d][i] for discussion of conversion of Chapter 11 and 13 cases to Chapter 12.

POST-CONFIRMATION BORROWING. The debtor's confirmed plan established the priority of the secured claims allowed in the case. The debtor sought permission to borrow funds for livestock expenses and to grant the lender a superpriority in the debtor's collateral which was subject to first priority liens. The debtor argued that Section 364(d)(1) gave the court authority to grant the superpriority lien. The court held that (1) it had no authority to grant superpriority because Section 364 applied only to estate property and after confirmation all estate property reverts to the debtor, and (2) the plan had established the priority of secured claims and that was binding on the court and debtor. ***In re* Les Ruggles & Sons, Inc., 222 B.R. 344 (Bankr. D. Neb. 1998)**.

FEDERAL TAXATION-*ALM* § 13.03[7].*

The Internal Revenue Service has announced that it has undertaken a new initiative to improve its procedures for handling bankruptcy cases. The new procedures are intended to minimize the likelihood that IRS collection actions will inadvertently violate the bankruptcy laws, to facilitate prompt correction of any violations that do occur, and to provide an administrative process for handling any claims for damages against the IRS that arise from such violations. **Ann. 98-89, I.R.B. 1998-__, __**.

AVOIDABLE LIENS. The Chapter 13 debtor sought to avoid perfected tax liens by arguing that the debtor, acting as trustee, had the power, under Section 545, to avoid liens. Section 545(2) makes the trustee a hypothetical bona fide purchaser of estate property. The debtor argued that, under I.R.C. § 6323, the trustee was a bona fide purchaser of the estate property entitled to a higher priority than the tax liens. The court rejected this argument, although noting that a minority of courts have agreed with the debtor's arguments, and held that the trustee's status as a hypothetical bona fide purchaser was not sufficient to be a bona fide purchaser under I.R.C. § 6323. ***In re* Stangel, 222 B.R. 289 (Bankr. N.D. Tex. 1998)**.

FEDERAL AGRICULTURAL PROGRAMS

CONSERVATION. The CCC has adopted as final regulations under Section 335 of the FAIR Act of 1996 establishing the Conservation Farm Option (CFO) Program for producers of wheat, feed grains, upland cotton, and rice. Only those owners and producers that have a farm with contract acres enrolled in production flexibility contracts established under the 1996 Act are eligible to participate in the CFO. Producers accepted into the CFO must enter into 10-year contracts which may be extended an additional 5 years. The purposes of CFO pilot programs include: (1) conservation of soil, water, and related resources; (2) water quality protection or improvement; (3) wetland restoration, protection, and creation; (4) wildlife habitat development and protection; and (5) other similar conservation purposes. To enroll in the program, producers are required to prepare a conservation farm plan which becomes part of the CFO contract. The plan describes all conservation practices to be implemented and maintained on acreage subject to contract. An important goal is to promote the adoption of resource conserving crop rotations while maintaining agricultural production and maximizing environmental benefits. The Act also requires the plan to contain a schedule for the implementation and maintenance of the practices, comply with highly erodible land and wetland conservation requirements of Title XII of the 1985 Act, and contain such other terms as the Secretary may require. Producers must also agree to forego payments under the Conservation Reserve Program (CRP), the Wetlands Reserve Program (WRP), and the Environmental Quality Incentives Program (EQIP). In lieu of these payments, the Secretary is required to offer annual payments under the contract that are equivalent to the payments the owner or producer would have received had the owner or producer participated in the CRP, the WRP and the EQIP. CCC will determine the CFO payment rates taking into consideration the payments that would have been received under the CRP, WRP, and EQIP, as applicable. CRP payments will not exceed the maximum bid price accepted for similar land in the vicinity.

The CFO pilot program will substitute a single annual payment for the different types of payments available under the CRP, the WRP, and EQIP, provide an incentive for coordinated, long-term natural resource planning, and be flexible enough to allow farmers and ranchers to operate in economically efficient, but innovative ways. The CFO provides for a locally-led approach by allowing individual farmers and ranchers, or groups of farmers and ranchers to implement innovative solutions to natural resource problems and encourages implementation of sustainable agricultural production practices.

CCC will determine CFO participation in a two step process: First, CCC will select CFO pilot project areas based on proposals submitted by the public; then, CCC will accept applications from eligible producers within the selected pilot project area.

CFO pilot projects will address resource problems and needs that are well documented and on a scale that will facilitate the evaluation of the effectiveness of the systems and practices installed, as well as that of the entire program. CFO pilot projects are intended to be simple, flexible, and should encourage sustainable agricultural production practices and support locally-led conservation goals.

CCC will select CFO pilot project areas based on the extent the proposal:

1. Demonstrates innovative approaches to conservation program delivery and administration;
2. Demonstrates innovative conservation technologies and systems;
3. Creates environmental benefits in a cost effective manner;
4. Addresses conservation of soil, water, and related resources, water quality protection or improvement; wetland restoration, protection, and creation; and wildlife habitat development and protection;
5. Ensures effective monitoring and evaluation of the pilot effort;
6. Considers multiple stakeholder participation (partnerships) within the pilot area; and
7. Provides additional non-Federal funding.

The CFO proposal package is available from any FSA or NRCS office. CCC will give preference to proposals that have high ratings based on the criteria upon which proposals will be evaluated. Pilot projects can involve either an individual or a group. In either case, to be considered for enrollment in CFO, each individual or entity within an approved pilot project area must submit an application which is the basis for the contract between the participant and CCC.

CFO proposals may be developed for a group of eligible producers by organizations or entities that desire to coordinate individual producer plan development and implementation activities. These group proposals may promote the adoption of sustainable farming or other conservation practices on several farms, thus, expanding the opportunity for greater acceptance of innovative and environmentally sound farming practices. Achievements from these efforts may serve as on-farm models to encourage others to accept new measures without government assistance. Moreover, groups participating will promote program success stories to enhance the CFO based on proved results.

Upon selection of pilot project areas, all producers with production flexibility contracts within the project area will be eligible to participate in the CFO. NRCS will approve CFO conservation farm plans and the local FSA office will approve the CFO contracts and make payments on behalf of CCC. **63 Fed. Reg. 51777 (Sept. 29, 1998), adding 7 C.F.R. Part 1468.**

CROP INSURANCE. The FCIC has adopted as final regulations to revise and reissue the nursery crop insurance provisions to provide policy changes to better meet the needs of insureds, and to restrict the effect of the Nursery Crop Insurance Regulations to the 1999 and prior crop years. **63 Fed. Reg. 50965 (Sept. 24, 1998)**.

The FCIC has issued proposed regulations which amend the common crop insurance policy basic provisions to add definitions and provisions to allow enterprise and whole farm units, allow the use of a written agreement to insure acreage that has not been planted and harvested in one of the three previous crop years, and amend the prevented planting provision that requires that at least one contiguous block of prevented planting acreage must constitute at least 20 acres or 20 percent of the insurable crop acreage in the unit before a prevented planting payment may be made. **63 Fed. Reg. 52194 (Sept. 30, 1998)**.

The FCIC has issued proposed regulations which amend the cotton crop insurance provisions and the extra long staple cotton crop insurance provisions for the 1999 and succeeding crop years to provide a replant payment if the insured crop is damaged by excess moisture, hail, or blowing sand or soil and is replanted; to revise the quality adjustment formula used to calculate the amount of production to count for cotton and ELS cotton; and to provide a prevented planting coverage level of 50 percent of the insured's production guarantee for timely planted acreage. **63 Fed. Reg. 52198 (Sept. 30, 1998)**.

FEDERAL ESTATE AND GIFT TAX

DISCLAIMERS-*ALM* § 5.02[6].* The taxpayer was a nephew of a prior decedent who had established 11 trusts for the decedent's child. The trust provided that if the child died without heirs, 1/20 of the trust would pass to the taxpayer. The taxpayer did not know about any of the contingent remainder interests created with the trusts and sought to disclaim the 1/20 interest in all trusts within nine months after the death of the child. The IRS ruled that the disclaimer would be timely. **Ltr. Rul. 9839019, June 25, 1998; Ltr. Rul. 9839019, June 25, 1998**.

JOINT TENANCY PROPERTY-*ALM* § 5.02[1].* The decedent had transferred a joint interest in real property to the decedent's daughter in return for past services the daughter provided for the decedent's construction company. The daughter had worked full and part-time for the company without wages but had lived with the decedent, receiving free room and board. The decedent's estate sought to exclude one-half of the value of the joint tenancy property, claiming that the daughter had provided sufficient consideration for her portion of the property. The estate argued that it needed to show only that the daughter provided more than minimal services. The court held that the daughter had not provided sufficient evidence of the value of her services and the estate had not provided sufficient evidence of the value of the property transferred in order for the court to determine that only one-half of the value of the property was included in the gross estate. **Estate of Van Tine v. Comm'r, T.C. Memo. 1998-344**.

FEDERAL INCOME TAXATION

PROPOSED LEGISLATION

Legislation has been introduced in the U.S. Senate corresponding to legislation recently introduced in the House of Representatives (see H.R. 4579):

1. The carryback period for farming losses would be increased to 10 years (five years in the House version) for 1998 and 1999. **S. 2467**.

Additional legislation:

1. For purposes of I.R.C. § 521 and Subchapter T, "marketing the products of members or other producers" would include the feeding of the products of members or other producers to cattle, hogs, fish, chickens, or other animals and the selling of the resulting animals or animal products. **S. 2498**.
2. Aggie bonds (small issue bonds) would be exempt from the volume cap imposed on industrial revenue bonds. **S. 2501**.
3. Gain from the sale of "(i) livestock described in section 1231(b)(3) held for breeding or dairy purposes, and "(ii) tangible personal property described in section 1231(b) which is used in the trade or business of farming" would be excluded from income for purposes of determining whether an individual is entitled to the earned income credit. **H.R. 4596**.
4. Insurance payments eligible for deferral under I.R.C. § 451(d) would include insurance payments under the Federal Crop Insurance Act. **H.R. 4636**.
5. Contingent interest payable under a shared appreciation mortgage would be deductible. **H.R. 4637**.
6. Recapture of FOBD benefits would not result from the sale or exchange of property produced in the ordinary course of business by a FOBD involving qualifying use of qualifying property. **H.R. 4640.**
7. The amount of additional estate tax imposed by recapture of FOBD benefits from the sale or exchange of FOBD property would be equal to the applicable percentage of the adjusted tax difference attributable to the qualified family-owned business interests. **H.R. 4640.**
8. Prepaid farm expenses incurred by reason of a change in business operations attributable to the enactment of the Agricultural Market Transition Act would be deferrable under I.R.C. § 464(f)(3)(A). **H.R. 4641**.
9. Chapter 12 of the bankruptcy law would be made permanent. Chapter 12 estates would be made separate tax entities. Income resulting from the abandonment of estate property in a Chapter 12 case would be made a liability of the estate. **H.R. 4645**.
10. The provisions for exclusion of gain from the sale of a residence would be expanded to include in the definition of residence land used in a farm business for the five years preceding the sale or exchange of a residence. **H.R. 4643**.
11. Farmers would be allowed the option of declaring the taxable year in which production flexibility contract payments and crop insurance payments are included in gross income. **H.R. 4644**.
12. For purposes of I.R.C. § 469(c) (relating to special rules for taxpayers in real property business) rental real estate activity would include the lease of real estate under a nonmaterial participation share lease. Nonmaterial participation lease would be defined to mean a lease if the income from such lease is not producing self-employment income (as defined in I.R.C. § 1402(b). **H.R. 4639**.
13. A deduction would be allowed for the cost of groceries purchased by employees and prepared into meals by employees for the convenience of employers. **H.R. 4638**

See Harl, "Suggested Legislation for the Agricultural Sector," p. 125 *supra*, for discussion of these items (except item 10 and except that items 6, 7 and 13 contain significant flaws)

CORPORATIONS-*ALM* § 7.02.*

CONSTRUCTIVE DIVIDENDS. The taxpayer was the sole shareholder of a corporation and made several withdrawals from the corporation which were designated as loans. However, no loan documents were executed and no loan terms were established. The taxpayer made several payments back to the corporation, including annual bonuses. The taxpayer eventually borrowed funds from unrelated parties to pay off the loans to the corporation. The court held that the distributions were loans and not taxable dividends because the taxpayer treated the distributions as loans and repaid all amounts withdrawn from the corporation. ***In re* Betpouey, 98-2 U.S. Tax Cas. (CCH) ¶ 50,745 (Bankr. E.D. La. 1998)**.

DEFINITION. The taxpayers were 50 percent shareholders in a corporation which was formed to purchase, own and maintain 450 acres of land with a cabin to be used as a hunting club for the sole use of the original six shareholders. The corporation registered with the state, obtained a federal employer identification number, filed corporate income tax returns which included business income and deductions such as depreciation, and issued stock which was redeemed by the taxpayers from four of the original shareholders. The corporation maintained the formalities of corporate status. The corporation sold the land to another corporation but did not report any gain from the sale. The taxpayers argued that the corporation did not exist because no business was transacted and the incorporation papers were filed with the state without their knowledge by one of the other original shareholders. The court held that actions of the corporation were sufficient to be held a corporation for federal income tax purposes. **Cane Creek Sportman's Club, Inc. v. Comm'r, T.C. Memo. 1998-341**.

CUMULATIVE BULLETINS. The IRS has announced that it proposes to discontinue production of the Cumulative Bulletins after volume 1997-2 (July-December 1997). The IRS reasoned that duplicate information already is available in the Internal Revenue Bulletins, including the cumulative listings which appear semiannually. The IRBs can also be obtained electronically with Internet access. A commercial distributor also produces a cumulative product similar to the Cumulative Bulletin. The IRS invites the general public and other federal agencies to comment on the proposed discontinuance of the Cumulative Bulletins. **63 Fed. Reg. 53127 (Oct. 2, 1998)**.

DEPENDENTS. The taxpayer had a 24 year old child who registered with a college on August 28, 1997 but did not begin classes until September 2, 1997. The college had denied the child resident tuition based on the failure of the child to meet the federal tax definition of dependent stated in Treas. Reg. 1.151-3(b) which required an adult dependent to be enrolled in an educational institution for some part of five months of the tax year. The IRS ruled that, because the child was registered in August and attended classes through the remaining months of 1997, the child met the five month requirement to be treated as a dependent for federal income tax purposes. **Ltr. Rul. 9839027, June 23, 1998**.

DISCHARGE OF INDEBTEDNESS. The taxpayer owned real property which was subject to a recourse obligation. The taxpayer defaulted on the loan and the property was sold at a foreclosure sale to the lender for an amount less than the loan but much more than the fair market value of the property. The lender forgave the remainder of the debt above the sale price. The taxpayer was insolvent before and after the sale. The court held that the amount realized by the taxpayer was the fair market value of the property at the time of the foreclosure sale. The court cited *Rev. Rul. 90-16, 1990-1 C.B. 12* for the holding that the transaction would be bifurcated to determine the tax consequences. First, the transaction produced a capital loss in that the amount realized was less than the taxpayer's basis in the property. Second, the taxpayer recognized discharge of indebtedness income to the extent the discharged debt exceeded the fair market value of the property. Because the taxpayer was insolvent after the sale, the discharge of indebtedness income was not taxable to the extent of the insolvency. **Frazier v. Comm'r, 111 T.C. No. 11 (1998)**.

EMPLOYEE BENEFITS. The taxpayer had retired from employment with a company but continued to receive payment for medical insurance premiums paid by the taxpayer. The court held that, because the payments were made to the taxpayer, the payments were not exempt from income, FICA and FUTA tax withholding. The court held that, under I.R.C. § 106, health insurance premiums were exempt from withholding only if made by an employer under a employer contribution plan. ***In re* Amoskeag Bank Shares, Inc., 98-2 U.S. Tax Cas. (CCH) ¶ 50,746 (D. N.H. 1998)**.

HOBBY LOSSES. The taxpayers, husband and wife, were both employed full time and purchased a rural property for their residence. After constructing three barns on the property, the taxpayers started horse training, breeding and raising activities but never realized a profit from the activity. The court held that the horse activity was not entered into for a profit, based on the following factors: (1) although the taxpayers maintained separate accounts and accurate books for the activity, the taxpayers did not form a business plan or make any changes to make the activity profitable; (2) although the taxpayers had expertise at training and breeding horses, the taxpayer did not have any expertise at operating the business aspect of the activity and did not consult with experts as to how to run the business profitably; (3) although the real property appreciated in value, the appreciation was not contributed to by the horse activity; (4) the activity never showed a profit; (5) the taxpayers had substantial income from other sources which was offset by the horse activity losses; and (6) the taxpayer received substantial personal pleasure from the horse activities. **Abbene v. Comm'r, T.C. Memo. 1998-330**.

LOSSES. The taxpayer was an S corporation which entered into an agreement with another corporation to buy technology developed by the other corporation. The taxpayer stopped payments under the agreement when it felt the other corporation was not performing under the terms of the contract. The taxpayer filed a lawsuit for breach of contract and received a settlement but the settlement was not paid. The shareholder/officers of the taxpayer decided not to pursue collection of the settlement and claimed a loss deduction. The court held that the loss deduction was not allowed because the evidence demonstrated that recovery from the other corporation was still a possibility, given the financial status of the taxpayer and the other corporation. **Estate of Wagner v. Comm'r, T.C. Memo. 1998-338**.

The taxpayer invested in a startup airline and had requested repayment of the investment after learning that many of the statements made by the airline's agent were false. The airline executed a promissory note for the repayment but never made any payments. The taxpayer claimed the lost investment as an ordinary loss but the IRS allowed the loss as a capital loss. The court held that the loss was a capital loss because the taxpayer was not in the trade or business of investing in startup companies. **Matz v. Comm'r, T.C. Memo. 1998-334**.

MEDICAL SAVINGS ACCOUNTS. I.R.C. §§ 220(i), (j) provide that if the number of medical savings account (MSA) returns filed for 1997 exceeds 600,000, then October 1, 1998, is a "cut-off" date for the MSA pilot project. If the number of MSA returns that will be filed for 1998 exceeds 750,000, then October 1, 1998, will also be a "cut-off" date for the MSA pilot project. The I.R.S. has determined that the applicable number of MSA returns filed for 1997 is 26,160, and that the applicable number of MSA returns projected to be filed for 1998 is 50,172 (after reduction in each case for statutorily specified exclusions, such as the exclusion for previously uninsured taxpayers). Consequently, the IRS has determined that October 1, 1998 is not a "cut-off" date and 1998 is not a "cut-off" year for the MSA pilot project. **Ann. 98-88, I.R.B. 1998-__, _**.

MILEAGE DEDUCTION. I.R.C. § 274(d) provides that a taxpayer is not allowed a deduction or credit for certain expenses unless the expense is substantiated. These substantiation requirements apply to the expenses of use of any listed property (defined in I.R.C. § 280F(d)(4)), which includes any passenger automobile and any other property used as a means of transportation. Treas. Reg. § 1.274(d)-1 provides, in part, that the Commissioner may prescribe rules under which mileage allowances reimbursing ordinary and necessary expenses of local travel and transportation while traveling away from home will satisfy the substantiation requirements of Treas. Reg. § 1.274-5T(c), and the requirements of an adequate accounting to the employer for purposes of Treas. Reg. § 1.274-5T(f)(4). However, Treas. Reg. § 1.274(d)-1(a)(3) provides that such mileage allowances are available only to the owner of a vehicle. New Treas. Reg. § 1.274(d)-1T applies these substantiation rules to mileage allowances for business use of an automobile after December 31, 1997, without the limitation in §1.274(d)-1(a)(3) that a mileage allowance is available only to the owner of a vehicle. See *Rev. Proc. 97-59, I.R.B. 1997-52, 24*, for rules that implement these regulations. **63 Fed. Reg. 52600 (Oct. 1, 1998)**.

PENSION PLANS. For plans beginning in September 1998, the weighted average is 6.46 percent with the permissible range of 5.82 to 6.85 percent (90 to 106 percent permissible range) and 5.82 to 7.11 percent (90 to 110 percent permissible range) for purposes of determining the full funding limitation under I.R.C. § 412(c)(7). **Notice 98-48, I.R.B. 1998-__, __**.

RETURNS. The IRS has announced that it has published revised Form 943, Employer's Annual Tax Return for Agricultural Employees. This and other forms are available from the IRS web site at **http:\\www.irs.ustreas.gov**.

SAFE HARBOR INTEREST RATES
October 1998

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	5.06	5.00	4.97	4.95
110% AFR	5.58	5.50	5.46	5.44
120% AFR	6.09	6.00	5.96	5.93
		Mid-term		
AFR	5.12	5.06	5.03	5.01
110% AFR	5.65	5.57	5.53	5.51
120% AFR	6.16	6.07	6.02	5.99
		Long-term		
AFR	5.46	5.39	5.35	5.33
110% AFR	6.02	5.93	5.89	5.86
120% AFR	6.57	6.47	6.42	6.38

S CORPORATIONS-*ALM* § 7.02[3][c].*

ELECTION. The taxpayer, the sole shareholder of a corporation, claimed to have mailed, by regular mail, a Form 2553, Election by a Small Business Corporation, to the IRS along with a Form SS-4. The IRS records indicated that the Form SS-4 was received by fax but had no evidence that the Form 2553 was received. The court held that the taxpayer failed to prove that the S corporation election was timely filed because the taxpayer provided no evidence of a postmark from a registered or certified mailing of the Form 2553. **Fankhauser v. Comm'r, T.C. Memo. 1998-328**.

SECOND CLASS OF STOCK. An S corporation entered into an agreement with its key managers to compensate them a specified amount if the corporation elects to redeem stock held by the managers through their retirement plans. The IRS ruled that the agreements did not create a second class of stock for purposes of the S corporation election. **Ltr. Rul. 9839007, June 23, 1998**.

PARTNERSHIPS-*ALM* § 7.02[3][c].*

DISCHARGE OF INDEBTEDNESS. The taxpayers were husband and wife and were living in Texas, a community property state. The taxpayers were partners in a partnership which had discharge of indebtedness income at the partnership level. All of the discharge of indebtedness income was properly allocated to the husband under the partnership agreement. Because the husband was insolvent, much of the discharge of indebtedness income was excluded from income. The wife had a net operating loss carryover but did not reduce the NOLs by any of the excluded discharge of indebtedness income, arguing that all of the income was allocated solely to the husband. The court held that, in a community property state, a spouse had an interest in all income and deductions of the other spouse; therefore, the husband's excluded discharge of indebtedness income had to be used to reduce the wife's NOLs. **Brickman v. Comm'r, T.C. Memo. 1998-340**.

SELF-EMPLOYMENT INCOME. Although the Congressional moratorium on issuance of the regulations expired on July 1, 1998, the IRS has announced that it will not issue Prop. Treas. Reg. § 1.1402(a)-2 which would have included in the definition of self-employment income a limited partner's share of partnership income if the partner actively participated in the partnership business or was personally liable for partnership debt.

NUISANCE

AGRICULTURAL AREA DESIGNATION. Iowa Code Ch. 352 provides for designation of rural property as an agricultural area. Such a designation excepted the property from being found to be a nuisance, except in several specified circumstances. The defendants had applied for designation of their land as an agricultural area and the county board of supervisors had approved the designation. The plaintiffs were neighboring landowners who challenged the constitutionality of the statute, arguing that the statute constituted a taking of property by the government without compensation. The court held that (1) the grant of immunity from a nuisance action was a grant of an easement over the neighbors' property, (2) an easement was a property right for which the government would have to pay compensation if the easement was forced on a property owner, and (3) the granting of immunity from nuisance suits was a taking of property for which compensation must be paid in order for the taking to be constitutional. The court held, therefore, that the statute was "flagrantly" unconstitutional. **Bormann v. Board of Supervisors, No. 192/96-2276, __ N.W.2d __ (Iowa 1998)**.

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