attorney, managed the legal support service enterprise. The LLC also provided consulting services to attorneys and health maintenance organizations (the other 50 percent owner of the LLC, the husband, was a medical doctor who worked full-time in a medical school).

The LLC incurred losses during the years at issue from the real estate leasing and support services activities which were used to offset gains from the consulting activity with the net losses passed through to the LLC owners.[16] The taxpayers classified the losses as nonpassive which allowed the netting of the losses. The Internal Revenue Service took the position that the LLCs leasing activities were *per se* passive and, therefore, were limited by the passive activity rules.[17]

The Tax Court, agreeing with the taxpayers, rejected the IRS argument that the leasing activities were *per se* passive and held that the taxpayers qualified for the "extraordinary personal services" exception under the passive activity rules for rental property.[18] The court agreed that the taxpayers had proved that the use of the leased real property by the tenants was incidental to the receipt of the LLCs services.[19] The temporary regulations state that extraordinary personal services are provided in connection with making property available to users ". . . only if the services provided in connection with the use of the property are performed by individuals, and the use. . . of the property is incidental to their receipt of such services."[20]

In addition to proving that the extraordinary personal services exception applied, the taxpayers also had to show that they had materially participated in the activity.[21] The Tax Court found the testimony compelling that wife's involvement exceeded the 500 hours required in the first of the seven tests for material participation.[22]

In conclusion

The Tax Court concluded that the LLCs activities were not passive activities, the losses were not passive and the losses could be netted with the other income of the LLC. Unless reversed on appeal, this case could be a useful template for planning in other settings where leasing occurs and extraordinary personal services are performed. The rejection of the IRS argument that the leasing activities were *per se* passive was a major development in the case.

FOOTNOTES

1 See generally 8 Harl, Agricultural Law § 61.02[5](2005); Harl, *Agricultural Law Manual* § 7.04[2][c](2005).

2 I.R.C. § 469.

3 Al Assaf v. Comm'r, T.C. Memo. 2005-14.

4 I.R.C. § 469. See, e.g., Hillman v. Comm'r, 114 T.C. 103 (2000), *rev'd*, 250 F.3d 228 (4th Cir. 2001), *on remand*, 118 T.C. 323 (2002) (owner of S corporation providing management services to real estate partnership could not offset passive deductions from partnership against nonpassive income from management fees earned by S corporation; real estate activity could not be segregated into separate rental and trade or business activities).

5 I.R.C. § 469(c)(1).

6 I.R.C. § 469(h)(1).

7 Temp. Treas. Reg. § 1.469-5T(e).

8 Temp. Treas. Reg. § 1.469-5T(e)(2).

9 Temp. Treas. Reg. § 1.469-5T(a)(1).

10 Temp. Treas. Reg. § 1.469-5T(a)(5).

11 Temp. Treas. Reg. § 1.469-5T(a)(6).

12 Temp. Treas. Reg. § 1.469-5T(e)(3).

13 Temp. Treas. Reg. § 1.469-5T(e)(3)(ii).

14 T.C. Memo. 2005-14.

15 *Id*.

16 *Id*.

17 *Id*.

18 Temp. Treas. Reg. § 1.469-1T(3)(ii)(c).

19 Al Assaf v. Comm'r, T.C. Memo. 2005-14.

20 Temp. Treas. Reg. § 1.469-1T(e)(3)(v).

21 Al Assaf v. Comm'r, T.C. Memo. 2005-14.

22 Temp. Treas. Reg. § 1.469-5T(a)(1).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

ANIMALS

BULL. The plaintiff worked as a carpenter for another carpenter who was performing woodworking services for the farmer defendant. The plaintiff was injured by a bull while working in a barn in which the bull was allowed to roam so as to impregnate cows. The plaintiff sued in strict liability and negligence to recover for the injuries. The court held that the defendant would be liable for personal injuries caused by the bull only if the defendant knew or should have known that the bull had vicious or violent propensities. The plaintiff did not provide any evidence of vicious or violent propensities of the bull and the defendant provided evidence that the bull had never attacked anyone before. The plaintiff provided expert testimony that breeding bulls were generally dangerous and vicious. The court held that evidence of the propensities of bulls in general was insufficient to meet the evidentiary requirement to show the propensities of the bull involved in the injury. summary judgment for the defendant was upheld. **Bard v. Jahnke, 2005 N.Y. App. Div. LEXIS 2668 (N.Y. S. Ct. 2005)**.

HORSES. The plaintiff, a minor, was injured while taking horse riding lessons at the defendant's stables. The plaintiff and a parent had filled out three releases before the plaintiff took the first lesson. The plaintiff filed a negligence suit and the defendant sought a summary judgment, arguing that the releases and the Wisconsin equine immunity statute, Wis. Stat. § 895-481, prevented the negligence claim. The trial court granted summary judgment to the defendant based on the releases and immunity statute. The plaintiff argued that an exception to the equine immunity statute applied because the defendant failed to safely manage the plaintiff's horse based on the inexperience of the plaintiff. The plaintiff offered the affidavit of another horse riding instructor that the lack of experience of the plaintiff required more control over the horse than was given by the defendant. The court held that the affidavit was sufficient evidence of a fact issue to deny summary judgment based on the equine immunity statute defense. The plaintiff also argued that the releases were void as against public policy. The court held that the releases were void because the releases were overbroad in the scope of activities covered, the persons released from liability, and the persons covered by the releases. **Mettler v. Nellis, 2005 Wisc. App. LEXIS 248 (Wis. Ct. App. 2005)**.

BANKRUPTCY

FEDERAL TAXATION

DISCHARGE. The debtor filed for Chapter 7 and received a discharge. After the discharge, the IRS audited the 1987 tax return of a corporation owned by the debtor and liquidated in 1988. The IRS determined that the corporation owed taxes for 1987 and that the debtor was personally responsible for those taxes because the corporation made distributions of property to the debtor in 1987. The debtor argued that the debtor's transferee liability for the corporation's taxes was not a tax; therefore, the liability was discharged in the Chapter 7 case. The court held that I.R.C. § 6901(a) provided for collection of transferee liability in the same manner as collection of a tax liability; therefore, the debtor's transferee liability was in the nature of a tax and was not discharged in the Chapter 7 case. **In re McKowen, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,242 (10th Cir. 2004), *aff'g*, 263 B.R. 618 (D. Colo. 2001)**.

The debtor failed to timely file and pay taxes for 1992 through 1996 and the IRS constructed substitute returns for making an assessment of the taxes, interest and penalties due. The debtor filed the returns for those years in 1999 and the IRS abated some of the assessed taxes based on the filed returns. The debtor filed for Chapter 7 in February 2003 and sought a discharge of the 1992 through 1996 taxes. The IRS argued that the debtor's returns did not qualify as returns for purposes of Section 523(a)(1) because they were filed after substitute returns were constructed and the taxes assessed. The court held that the debtor's returns did qualify as returns because the IRS made use of the returns in abating some of the taxes. ***In re* Colsen, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,240 (Bankr. 8th Cir. 2005), *aff'g*, 2004-2 U.S. Tax Cas. (CCH) ¶ 50,304 (Bankr. N.D. Iowa 2004)**.

The debtor had failed to timely file income taxes for several years but eventually filed the returns for 1983 through 1990 in 1992. The IRS acknowledged receipt of all but the 1986 return. The debtor filed for Chapter 7 and received a discharge but the IRS argued that the 1986 taxes owed were not discharged because no return was filed. The debtor presented evidence of a signed and dated copy of the 1986 return which was also signed by the return preparer. The court held that the copy of the return and the fact that the return was filed with several other returns which were received moved the burden of proof to the IRS to show that it did not receive the return. Because the IRS filed to prove that the return was not filed, the court held that the 1986 taxes were discharged. The IRS also argued that the filing of the 1986 return six years after it was due was not an "honest and reasonable attempt" to meet the filing requirements and should not be considered a return for purposes of Section 523(a)(B). The court held that, because the late returns were filed in order to enable the debtor to make offers in compromise, the returns served a valid good faith purpose and would be considered valid returns for purposes of the discharge of the taxes owed. ***In re* Payne, 2005-1 U.S. Tax Cas. (CCH) ¶ 50,226 (N.D. Ill. 2005), *aff'g*, 2004-1 U.S. Tax Cas. (CCH) ¶ 50,210 (Bankr. N.D. Ill. 2004)**.

CONTRACTS

STATUTE OF FRAUDS. The plaintiff approached the defendant bank for loans in order to obtain funds to purchase a partner's interest in land and cattle which were being auctioned. The plaintiff and bank were unable to execute a written loan agreement before the auction and the plaintiff obtained oral permission from a bank officer to purchase the cattle in expectation that the loan would be made. The plaintiff purchased all of the cattle but the bank failed to make the loan. The plaintiff sued for breach of contract, breach of the covenant of good faith and fair dealing, and fraud. The bank moved for summary judgment on the ground that the statute of frauds barred the plaintiff's claims. The plaintiff argued the doctrines of part performance, equitable estoppel and promissory estoppel prevented the bank from raising the statute of frauds as a defense. The court held that the doctrine of part performance did not apply because, although the plaintiff did perform the purchase of the cattle, the alleged oral agreement was not complete. The court noted that the amount of the loan and the interest rate were not set, the security was not identified, the repayment period was not identified and the default rights of the parties were not clear. The court also refused to apply the doctrines of promissory and equitable estoppel for the same reason. In addition, the court held that no breach of the implied covenant of good faith and fair dealing occurred because a complete agreement was not reached. The court rejected the fraud claim because it found that the plaintiff knew that a promise to make a loan was unenforceable unless it was in writing. **Lettunich v. Key Bank, 2005 Ida. LEXIS 61 (Idaho 2005)**.

FEDERAL AGRICULTURAL PROGRAMS

BIOTERRORISM. The APHIS has adopted as final regulations governing the possession, use, and transfer of biological agents and toxins that have been determined to have the potential to pose a severe threat to public health and safety, to animal health, to plant health, or to animal or plant products. **70 Fed. Reg. 13241 (March 18, 2005)**.

CONSERVATION SECURITY PROGRAM. The CCC has adopted as final regulations for administering the Conservation Security Program which provides financial and technical assistance to agricultural producers who, in accordance with certain requirements, conserve and improve the quality of soil, water, air, energy, plant and animal life, and support other conservation activities. **70 Fed. Reg. 15201 (March 25, 2005)**.

DISASTER PROGRAMS. The CCC has adopted as final regulations implementing portions of the Military Construction, Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005 to authorize crop-loss disaster assistance for producers who suffered 2003, 2004, or 2005 crop losses caused by damaging weather and related conditions. Also included under this rule is authority for disaster assistance specifically for producers in Virginia, and producers of fruit and vegetable crops located in North Carolina that suffered losses due to adverse weather and related conditions that occurred in 2003. **70 Fed. Reg. 15725 (March 29, 2005)**.

The CCC has adopted as final regulations implementing the 2003-2004 Livestock Assistance Program (LAP) as provided for by the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act of 2005. Under LAP, assistance will be available to livestock producers for either 2003 or 2004 grazing losses in a county that was designated as a primary disaster county by the President or the Secretary of Agriculture after January 1, 2003, for certain losses occurring through December 31, 2004. Assistance will be made available in the same manner as was provided under the 2002 LAP. **70 Fed. Reg. 16392 (March 31, 2005)**.

FARM PROGRAMS. The CCC has announced the extension, until October 31, 2005, of the period in which CCC will automatically reduce any Direct and Counter-Cyclical Payments to satisfy a producer's obligation to repay unearned 2003-crop advance counter-cyclical payments. Scheduled payments received during this period include 2004-crop final direct payments, 2004-crop advance counter-cyclical payments, and 2005-crop advance direct payments. **70 Fed. Reg. 13443 (March 21, 2005)**.

KARNAL BUNT. The APHIS has issued interim regulations adding areas in La Paz, Maricopa and Pinal Counties in Arizona and in Riverside County, CA to the list of regulated areas and removing areas in Maricopa and Pinal Counties in Arizona and Imperial County, CA from the list of regulated areas. **70 Fed. Reg. 15553 (March 28, 2005)**.

FEDERAL ESTATE AND GIFT TAXATION

TRANSFERS WITH RETAINED INTERESTS. The decedent had obtained other residential rental property in exchange for the decedent's residence. The new property was transferred to a trust for the decedent's benefit which transferred the property to a family limited partnership. The decedent had transferred partnership interests to heirs before the decedent's death. The court held that the property was included in the decedent's estate because the court found that there existed an implied agreement that the decedent would receive all the income from the property and that the property remained as collateral for decedent's loan obligations. The court also held that the transfer to the partnership was not a bona fide sale for adequate and full consideration because the transfer was not made in good faith. The court held that the transfer was not made in good faith because (1) the decedent was not able to meet financial obligations after the transfer; (2) the partners did not meet the formalities of the partnership, such as by keeping separate partnership records; and (3) the decedent received only tax benefits from the transfer. **Estate of Bigelow v. Comm'r, T.C. Memo. 2005-65**.

TRUSTS. The IRS has issued a revenue procedure providing a safe harbor for any charitable remainder annuity trust (CRAT) or charitable remainder unitrust (CRUT) that is created by the grantor, if: (1) the grantor's surviving spouse has a right under state law to elect on the grantor's death to receive an elective, statutory share of the grantor's estate, and (2) such share could be satisfied in whole or in part from assets of the CRAT or CRUT in violation of I.R.C. § 664(d)(1)(B) (in the case of a CRAT) and I.R.C. § 664(d)(2)(B) (in the case of a CRUT). The statutes provide that no amount other than the annuity payments or the unitrust payments may be paid to or for the use of any person other than a charitable organization. To qualify for the safe harbor, the spouse must irrevocably waive the right to elect his or her statutory share in the manner prescribed. For trusts created before June 28, 2005, the IRS will disregard the right of election, even without a waiver, but only if the spouse does not exercise the right of election. **Rev. Proc. 2005-24, I.R.B. 2005-16**.

The taxpayer operated a floor installation business from the taxpayer's residence as a sole proprietor before transferring the business assets to a trust. The court looked at the four factors used in *Markosian v. Comm'r, 73 T.C. 1235*

(1980), to determine whether the trust was a sham and should be disregarded for income tax purposes.. The court held that the trust was included in the taxpayer's income because the trust had no economic substance in that (1) the taxpayer's relationship to the business did not change after the transfer and the taxpayer was not subject to any trustee in making decisions about the business; (2) the trust did not have an independent trustee and the taxpayer continued to exercise complete control over the business; (3) distributions from the trust were primarily for the benefit of the taxpayer and did not benefit other interest holders in the trust; and (4) the use of the trust did not impose any restrictions on the taxpayer's control of the business or other assets. **Edwards v. Comm'r, T.C. Memo. 2005-52**.

FEDERAL INCOME TAXATION

ALIMONY. The taxpayer lived in California, a community property state. The taxpayer's divorce decree required the taxpayer to pay the former spouse a monthly amount equal to one-half of the taxpayer's pension benefits to which the taxpayer was entitled whether or not the taxpayer was retired. The taxpayer was eligible for retirement but had not retired in 2000 so the taxpayer had to make the payments from wage income and deducted the payments from taxable income. The IRS argued that the payments were not deductible because the taxpayer was not retired when the payments were made and the deduction violated the assignment of income rules. The court held that the payments qualified for exclusion because the payments were made under the divorce decree as a division of community property. The court also held that the exclusion of the payments did not violate the assignment of income rules in that, under the community property rules, the former spouse was already entitled to one-half of the taxpayer's income. **Dunkin v. Comm'r, 124 T.C. No. 10 (2005)**.

CASUALTY LOSSES. Note: The following summary appeared on p. 44 *supra* with an error in the fourth sentence. We regret the error. The summary should have read as follows: The taxpayer purchased for $5,000 a remainder one-fourth interest in two 40 acre tracts of rural land with the intent to make a profit. On one tract stood a barn with a fair market value of $46,000 which was destroyed by a wind storm. The taxpayer claimed a casualty loss for the full market value of the barn less the salvage value of the lumber, $2,000. The court held that the taxpayer's casualty loss deduction was limited to the lesser [Note: was incorrectly "greater" in the original summary.] of the taxpayer's basis in the barn or one-fourth of the fair market value of the barn, less one-fourth of the salvage value. The court allocated $1,350 of the taxpayer's original purchase price to the barn and held that the taxpayer's casualty loss deduction was limited to that amount. **McClune v. Comm'r, T.C. Memo. 2005-47**.

COOPERATIVES. The taxpayer was a C corporation which marketed and sold products produced by franchise holders. The taxpayer's shareholders, including many of the franchisees, voted to change the structure of the corporation to qualify as operating on a cooperative basis. The new structure converted the franchisees into patrons and converted control of the taxpayer to democratic control by the franchisees/patrons. The taxpayer's net earnings were to be distributed to the franchisees/patrons in proportion to amount of business conducted with each patron. The taxpayer identified several business reasons for the change, including better management of the franchises and production, marketing and development of the products. The IRS ruled that the taxpayer would be considered as operating on a cooperative basis under I.R.C. § 1381. **Ltr. Rul. 200512001, Dec. 3, 2004**.

CORPORATIONS

CONSTRUCTIVE DIVIDENDS. The taxpayer owned 40 percent of the stock of a corporation to which the taxpayer provided services. The corporation made payments of the taxpayer's personal federal income tax and state income tax. The corporation made cash disbursements to the taxpayer and the taxpayer charged personal items to the corporation's credit card. The taxpayer claimed that the payments and distributions were loans. The court examined five of the seven factors of a loan/constructive dividend determination used in *Welch v. Comm'r, 204 F.3d 1228 (9th Cir. 2000), affg., T.C. Memo. 1998-121*, to hold that the payments, distributions and charges were loans—(1) deductions were made from the taxpayer's salary which were charged as interest to the taxpayer; (2) the taxpayer made repayment of the distributions in the past; (3) the taxpayer had sufficient income to repay the outstanding amount; (4) the corporation had sufficient assets to make the loans; and (5) the taxpayer and corporation both treated the items as loans. **Morrison v. Comm'r, T.C. Memo. 2005-53**.

COURT AWARDS AND SETTLEMENTS. The plaintiff filed complaints against a former employer for employment discrimination based on whistleblower provisions in six environmental statutes. The plaintiff sought, and was awarded, damages for mental pain and anguish and for damage to personal reputation. The court held that the first test of *Commissioner v. Schleier, 515 U.S. 323 (1995)*, was met in that the six statutes created tort-like actions but the second test of a claim based on physical injuries was not met because mental pain and anguish were not physical personal injury. Although the plaintiff suffered from Bruxism (gnashing of teeth while sleeping), the court noted that the physical damage resulted from the mental anguish and not from the discrimination. Therefore, the court held that the judgment payments were included in income. **Murphy v. I.R.S., 2005-1 U.S. Tax Cas. (CCH) ¶ 50,237 (D. D.C. 2005**.

DEPRECIATION. The IRS has issued tables detailing the (1) limitations on depreciation deductions for owners of passenger automobiles first placed in service during calendar year 2005, including separate limitations on passenger automobiles designed to be propelled primarily by electricity and built by an original equipment manufacturer (electric automobiles); (2) the amounts to be included in income by lessees of passenger automobiles first leased during calendar year 2005, including separate inclusion amounts for electric automobiles; and (3) the maximum allowable value of employer-provided automobiles first made available to employees for personal use in calendar year 2005 for which the vehicle cents-per-mile valuation rule provided under Treas. Reg. § 1.61-21(e) may be applicable.

For passenger automobiles (other than electric automobiles) placed in service in 2005 the depreciation limitations are as follows:

Tax Year	Amount
1st tax year	$2,960
2d tax year	4,700
3d tax year	2,850
Each succeeding year	1,675

For trucks and vans placed in service in 2005 the depreciation limitations are as follows:

Tax Year	Amount
1st tax year	$3,260
2d tax year	5,200
3d tax year	3,150
Each succeeding year	1,875

For electric automobiles placed in service in 2005 the depreciation limitations are as follows:

Tax Year	Amount
1st tax year	$8,880
2d tax year	14,200
3d tax year	8,450
Each succeeding year	5,125

Rev. Proc. 2005-13, I.R.B. 2005-12, 759.

INSURANCE PAYMENTS. The taxpayer had purchased credit insurance on two credit card accounts insurng against death, disability and unemployment. When the taxpayer became unemployed, the insurance made the payments on the credit card in 2001. The taxpayer did not include these payments in income, arguing that the payments were similar to insurance payments for casualty losses. The court held that the payments were income because the payments did not replace any capital interests lost by the taxpayer and the taxpayer had no basis in the credit card liability. **Bunker v. Comm'r, T.C. Summary Op. 2005-35**.

OFFER IN COMPROMISE. The taxpayers, husband and wife, exercised some incentive stock options which resulted in alternative minimum tax liability. The stock dropped significantly in value after the exercise. The taxpayers paid some of the tax liability but offered to settle the remaining $125,000 tax liability for $4,200. The IRS rejected the offer in compromise because the taxpayers had sufficient assets and income to pay the tax. The taxpayer argued that the offer in compromise should have been accepted because the stock dropped in value and the taxes owed exceeded the value of the stock. The court held that the IRS did not abuse its discretion in rejecting the offer in compromise. **Speltz v. Comm'r, 124 T.C. No. 9 (2005)**.

PARTNERSHIPS

BASIS ADJUSTMENTS**.** Under the American Jobs Creation Act of 2004, a partnership is required to reduce its basis in partnership property upon a distribution of partnership property if there is a "substantial basis reduction." Under I.R.C. § 734(d) a substantial basis reduction is defined as a downward adjustment of more than $250,000 if a Section 754 election were in effect at the time of the distribution. The 2004 Act also requires a partnership to reduce the basis of partnership property upon a transfer after October 22, 2004 of an interest in the partnership by sale or exchange or upon the death of a partner, if, at the time of the relevant transfer, the partnership has a "substantial built-in loss." For these purposes, a partnership has a substantial built-in loss with respect to a transfer of a partnership interest if the partnership's adjusted basis in the partnership's property exceeds by more than $250,000 the fair market value of the property. The IRS has issued interim procedures for complying with the 2004 Act provisions and will issue regulations implementing the 2004 Act provisions. **Notice 2005-32, I.R.B. 2005-16**.

INSTALLMENT OBLIGATIONS. The IRS has adopted as final regulations governing income tax treatment of installment obligations acquired by partnerships. Under the regulations, installment obligations acquired by a partnership are I.R.C. § 704(c) property if the obligation is acquired in exchange for partnership Section 704(c) property or under a contract. The new rules apply to installment obligations acquired on or after November 24, 2003. **70 Fed. Reg. 14394 (March 22, 2005)**.

RETURNS. Tax professionals who e-file five or more accepted individual or business returns in a calendar year may now use three of the IRS's e-Service products previously reserved for those who e-filed 100 or more individual returns: Disclosure Authorization (DA), Electronic Account Resolution (EAR), and Transcript Delivery System (TDS). DA allows tax professionals to complete, view and modify disclosure authorization forms, including Form 2848, Power of Attorney and Declaration of Representative, and Form 8821, Tax Information Authorization. EAR allows tax professionals, who already have power of attorney, to send and receive information electronically about individual account problems, refunds, installment agreements, missing payments or notices. TDS allows tax professionals with power of attorney to request and receive account and various other transcripts. **IR-2005-33.**

The IRS has issued the following revised forms: Publication 1542 (Revised January 2005), Per Diem Rates. The IRS notes that as of April 1, 2005, print copies of Publication 1542 can no longer be ordered but will continue to be available on the IRS web site. The January revision of Publication 1542 reflects changes in the per diem rates in Aurora, Colorado; Cocoa Beach, Florida; Dallas, Texas; and Great Neck, New Jersey. The forms are available on the IRS web site, www.irs.gov/formspubs/index.html, in the **Forms & Pubs** section.

SALE OF REAL PROPERTY. The taxpayer sold several real estate properties for a gain but did not file income tax returns reporting the sales or gain. The taxpayer argued that the basis in each property was increased by several items for which the taxpayer did not have records, including personal labor, remodeling expenses, taxes and interest. The IRS disallowed these additions to basis for lack of substantiation and because the expenses were not incurred as part of a trade or business. The taxpayer's response was several frivolous "tax protestor" arguments. The IRS assessed tax deficiencies based on the sale closing documents and disallowed any increase in basis for the expenses claimed by the taxpayer. The court upheld the IRS assessments and upheld imposition of the I.R.C. § 6651 penalty for failure to file a return, the I.R.C. § 6654 addition to tax for failure to pay estimate tax payments, and the I.R.C. § 6673 penalty for the making of frivolous arguments. **Storaasli v. Comm'r, TC. Memo. 2005-59**.

TRAVEL EXPENSES. The IRS has announced the applicable terminal charge and the Standard Industry Fare Level mileage rates for determining the value of noncommercial flights on employer-provided aircraft in effect for the first half of 2005 for purposes of the taxation of fringe benefits .**Rev. Rul. 2005-14, I.R.B. 2005-12, 749**.

PROPERTY

BOUNDARY FENCE. The plaintiff and defendant owned neighboring properties divided by a fence. A survey in 2002 showed the plaintiff's property to extend beyond the fence. The testimony from both parties and their witnesses agreed that the fence was recognized as the dividing line between the properties, although a portion of the disputed property was used by everyone, including the general public, as a swimming hole. The court held that the unanimous testimony was sufficient to establish the fence as the boundary line by acquiescence. **Mayes v. Massery, 2005 Ark. App. LEXIS 255 (Ark. Ct. App. 2005)**.

RIGHT-OF-WAY. The plaintiff owned property over which a railroad easement ran. The railroad right-of-way was granted prior to the date the federal government issued a land patent title to the first landowner of the land subject to the railroad right-of-way. The railroad right-of-way was abandoned by the railroad in 1998 and the Surface Transportation Board (STB) of the U.S. Dept. of Transportation authorized The Land Concervancy of Seattle and King County to assume financial responsibility for the railroad right-of-way pursuant to the National Trails System Act Amendments of 1983. The STB approved the conversion of the railroad right-of-way to a recreational trail by issuing a Notice of Interim Trail Use (NITU). The plaintiff claimed that the issuing of the NITU constituted a governmental taking of the plaintiff's property interest in the railroad right-of-way and sought compensation. The court held that the original grant of the railroad right-of-way was a simple easement and the grant of the original title patent did not create a reversionary interest in the federal government which revested on the abandonment of the railroad right-of-way. The court noted that there remained many issues to be resolved and limited its holding to the reversionary interest in the railroad right-of-way. **Beres v. United States, 2005 U.S. Claims LEXIS 65 (Ct. Cls. 2005)**.

STATUTORY WAY OF NECESSITY (EASEMENT). The plaintiff owned land-locked property neighboring the defendant's property. The defendant had allowed the plaintiff to travel over the defendant's land to access the plaintiff's property but denied access, claiming that the plaintiff had leased the property to a hunt club whose members were annoying. The plaintiff sought a court order creating a statutory way of necessity, easement, under Fla. Stat. § 704. The trial court had granted the easement and awarded the defendant $500 as compensation. Under Fla. Stat. § 704.01(2) an easement is to be granted for land-locked property "used for a dwelling or dwellings or for agricultural or for timber raising or cutting or stock raising." The defendant argued that the easement should have been limited to access for the purposes identified in the statute and not for hunting. The appellate court agreed and remanded the case for the trial court to limit the use of the easement to the purposes identified in the statute. **Staten v. Gonzalez-Falla, 2005 Fla. App. LEXIS 3592 (Fla. Ct. App. 2005)**.

STATE TAXATION

AGRICULTURAL USE. The plaintiffs constructed seven temporary greenhouses on their farm land. One of the greenhouses was used for sales transactions and displays of the plants, while the other greenhouses were used to raise plants sold in the sales greenhouse. The customer transactions occurred only in the sales greenhouse and no plants were grown in the sales greenhouse except while on display for sale. Although all the greenhouses were taxed under the farmland tax exemption for several years, a new tax assessor determined that the greenhouses did not qualify for the exemption because the houses contained sales space in that customers could view the plants in the other greenhouses before purchase in the sales greenhouse. The plaintiffs did not seek the exemption for the sales greenhouse, but challenged the change of assessment for the other six greenhouses which were used primarily for growing the plants. All lower appeals were lost on the basis that the existence of retail sales space in one greenhouse destroyed the "single-use" nature of the greenhouses required for the exemption. Under N.J. Stat. § 54:4-23.12(a) greenhouses are excluded from the farmland exemption if they "enclose a space within [their] walls used for . . . office or sales space." The court held that the farmland exemption law contemplated that some sales activity would be allowed without disqualifying all of the greenhouses from the exemption; therefore, the six greenhouses were eligible for the farmland exemption as single-use agricultural structures. **Township of Monroe v. Gasko, 2005 N.J. LEXIS 190 (N.J. 2005)**.

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ZONING

EXCEPTIONS. The plaintiffs owned farmland which had been included in a city's urban growth boundary and zoned "urban transition/farm." The property was part of the city's proposed industrial planning area but when the need for such property was removed, the city released the property back to the county. After hearings, the county passed an ordinance which zoned the plaintiff's property as primary agricultural use property. The state Land Use Board of Appeals remanded the ordinance to the county for findings required by law. The county did not hold additional hearings but merely made additional findings and passed a new ordinance which zoned the plaintiff's land as "exclusive farm use" (EFU) property based solely on the existence of Class II and III soil on the land. The plaintiff argued that the new ordinance was invalid because the county did not give the plaintiff any opportunity to present arguments or evidence at a hearing and that the plaintiff was entitled to an exception for residential use of the property based on an exception under the original zoning classification for the city. The court held that the county ordinance was invalid in that the county did not hold a new hearing and did not make findings on all factors which support a zoning classification of EFU: (1) soils that are suitable for agricultural production using accepted farming practices, especially Class I-IV soils; (2) areas of open land that are relatively free from non-farm conflicts and are still capable of being farmed; (3) areas that are in farm production or are capable of being farmed now or in the future; and (4) those other lands that are necessary to protect farm uses by limiting adjoining non-farm activities. The court held that the plaintiff failed to demonstrate that a residential use exception was part of the zoning classification by the city; therefore, no exception carried over to the county zoning classification. However, the court noted that the new hearing would give the plaintiff a chance to argue for the granting of an exception. **Manning v. Land Conservation and Development Comm'n, 2005 Ore. App. LEXIS 328 (Or. Ct. App. 2005)**.

CITATION UPDATES

Estate of Davis v. Comm'r, 394 F.3d 1294 (9th Cir. 2005), ***aff'g*****, T.C. Memo. 2003-55** (marital deduction) see p. 19 *supra*.

IN THE NEWS

WATER LAW. Plaintiff sought a declaration from the water court that its interest in water delivered to real property pursuant to two contracts was not perpetually restricted to irrigation of the property, but rather was a water right capable of being changed in point of diversion and place and type of use. The water court declared the nature and extent of petitioner's water right under contract were limited to diversion from a specified location for irrigation use on identified lands. The appellate court affirmed and held that plaintiff neither owned a water right by virtue of appropriation nor hold shares in a mutual ditch company; rather, the plaintiff owned contractual delivery rights. Because the contracts were ambiguous, the court looked to extrinsic evidence to determine the nature of those delivery rights. In consideration of all the circumstances surrounding the formation of the delivery contracts, the court determined that the parties intended to create restrictive rights to receive a certain amount of water for the purpose of irrigating identified lands. Thus, the contract cannot support a change of use and a change of place of diversion. **Colorado Supreme Court Opinions March 21, 2005 No. 03SA372, East Ridge of Fort Collins LLC v. The Larimer and Weld Irrigation Company**.