But in the absence of date-of-death fair market value determinations, what about sales after death (or even before death)? Several recent cases have provided useful guidance on the acceptability of valuations derived from such sales.

It is generally accepted that for this purpose, fair market value is the price that a hypothetical willing buyer would pay a hypothetical willing seller, both persons having reasonable knowledge of all relevant facts and neither person under a compulsion to buy or to sell.[12]

In a 2001 case decided by the Ninth Circuit Court of Appeals,[13] the per share price paid for closely-held corporation stock (which was not publicly traded) in a sale shortly after the decedent's death was dispositive as to stock value. The sales were accepted as evidence of the value of the estate's minority interest in the corporation because the sales – (1) occurred within two months after the end of the alternate valuation date which was elected by the estate; (2) the sale involved willing and knowledgeable buyers and sellers; and (3) the sales were neither forced nor distressed.[14] The appellate court reversed the Tax Court which had held that the sales were not at arm's length and were ". . . not sufficiently similar to the estate's much larger . . . interest to make their sales price representative of the value of the estate's stock."[15]

In a 2005 Tax Court case,[16] the fair market value of a decedent's interest in the stock of a closely-held bank was determined using the actual sales price of the stock in a transaction that occurred after the decedent's death. Two transactions involving the stock had occurred in the 15-month period *prior* to death but the Tax Court held that those stock prices were not indicative of the stock's fair market value because – (1) the sellers of those shares were believed not to be knowledgeable, with the shares involved selling for substantially less than the appraised value; and (2) the shares sold at that time (17) were not comparable in number to the decedent's 116 shares which were sold in the transaction after death. The third sale, occurring nearly 14 months after death, was considered by the court to be the best measure of the fair market value of the decedent's stock interest in the bank because the sale was an arm's length transaction, consummated by unrelated parties and involved the actual stock interest held by the decedent at death.[17] The only adjustment allowed was a three-percent adjustment for inflation to account for the passage of time. The court noted that the record did not establish the presence of any other material change in circumstances between the date of the post-death sale and the applicable valuation date.[18]

Endnotes

[1] Harl, "Effect of Late Adjustments to Values at Death for Purposes of Setting the Income Tax Basis," 19 *Agric. L. Dig.* 49 (2008). See generally 5 Harl, *Agricultural Law* § 44.05[3] (2008); Harl, *Agricultural Law Manual* § 5.04[5][c] (2008).

[2] I.R.C. §§ 2031(a), 2032(a), 2032A.

[3] See Harl, note 1 *supra*.

[4] I.R.C. § 2031(a).

[5] I.R.C. § 2032(a).

[6] *Id.*

[7] Rev. Rul. 63-223, 1963-2 C.B. 100.

[8] I.R.C. § 2032A.

[9] I.R.C. § 2032A(a)(1).

[10] I.R.C. § 2031(c).

[11] I.R.C. § 2031(c)(1).

[12] Treas. Reg. § 20.2031-1(b). See United States v. Cartwright, 411 U.S. 546 (1973).

[13] Morrissey v. Commissioner, 243 F.3d 1145 (9th Cir. 2001), *rev'g and rem'g*, Estate of Kaufman v. Comm'r, T.C. Memo. 1999-119.

[14] *Id.*

[15] Estate of Kaufman v. Comm'r, T.C. Memo. 1999-119.

[16] Estate of Noble v. Comm'r, T.C. Memo. 2005-2.

[17] *Id.* See Estate of Fitts v. Comm'r, 237 F.2d 729 (8th Cir. 1956), *aff'g*, T.C. Memo. 1955-269.

[18] *Id.*

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

CONTRACTS

ACCEPTANCE OF GOODS. The debtor entered into a finance lease contract under which the debtor agreed to lease four crop sprinkler systems which were purchased from a third party. The debtor received one system and had it installed but the second and third systems were delivered but not installed. A fourth system was not delivered. None of the sprinkler systems conformed to the systems identified under the contract. However, the debtor did not unconditionally reject any of the delivered systems but indicated that an attempt to use the systems was intended. The debtor did unconditionally reject the second and third systems four months after delivery. The court held that the debtor was liable for the lease payments on the three sprinkler system delivered because the debtor failed to make a timely unconditional rejection of the systems. ***In re* Rafter Seven Ranches LP v. C.H. Brown Co., 2008 U.S. App. LEXIS 23558 (10th Cir. 2008), *aff'g*, 362 B.R.**

25 (Bankr. 10th Cir. 2007), ***aff'g*****, 2006 Bankr. LEXIS 186 (Bankr. D. Kan. 2006)**.

FEDERAL AGRICULTURAL PROGRAMS

CROP DISASTER PROGRAM. The plaintiff applied to the Farm Service Agency (FSA) for Crop Disaster Program (CDP) payments relating to damages sustained to a 2003 tobacco crop. Absent any damage to the plaintiff's crops, the effective price of the plaintiff's crops would have been $644,000. Due to heavy rains, the plaintiff produced only 65 percent of the estimated crop output production for the 2003 crop year, which the plaintiff sold for $395,000. As a result of the loss in crop output, the plaintiff recovered $263,000 in insurance proceeds. Totaling the plaintiff's insurance recovery and the income the plaintiff received from the sale of her crop, the plaintiff received $658,000 relating to her 2003 tobacco crop, or 102 percent of the expected effective price for the plaintiff's 2003 tobacco crop. The plaintiff submitted a claim for CDP payments and, due to a miscalculation by the county FSA office, the plaintiff received an $80,000 overpayment. In determining which farmers would receive the benefit of the finality rule and not be required to repay the overpayment they received, the FSA adopted the following rule: if a tobacco producer's total crop value fell below 92 percent of its effective quota before CDP payments and less than 110 percent of its effective quota after CDP payments, the FSA would give them the benefit of the doubt and the finality rule would apply. Otherwise, the tobacco producer would be considered to have had a reason to know about the overpayment and would be required to repay the sum received. On August 2, 2006, the FSA ruled that the finality rule did not apply to the plaintiff because the plaintiff had "reason to know" that the payment of $80,000 was erroneous. The court held that the evidence demonstrated that the plaintiff had sufficient notice, records and personal experience to know that the payments were in excess of the CDP payments the plaintiff was entitled to and that the excess payments would have to be repaid to the FSA. **Tyson v. United States, 2008 U.S. Dist. LEXIS 99202 (E.D. N.C. 2008)**.

PACKERS AND STOCKYARDS ACT. The GIPSA has issued proposed regulations amending the regulations under the Packers and Stockyards Act (7 U.S.C. 181 *et seq*.) regarding the registration of market agencies and dealers. Under the current regulations, there is no expiration date or renewal process for the registration of a market agency or dealer under the Act. The proposed regulations would establish a 5-year term for registrations and renewal procedures. **73 Fed. Reg. 76288 (Dec. 16, 2008)**.

FEDERAL ESTATE AND GIFT TAXATION

IRA. The decedent owned an IRA with an individual as the reminder beneficiary. The individual disclaimed any interest in the IRA and the IRS reverted to the decedent's estate. The executor fulfilled several charitable bequests through a testamentary trust by making the charities beneficiaries of the IRA. The IRS ruled that distributions from the IRA to the charities would include income in respect of a decedent when actually distributed. **Ltr. Rul. 200850004, Sept. 8, 2008**.

The decedent owned an interest in an IRA which had the surviving spouse as remainder beneficiary. The spouse disclaimed any interest in the IRA, which then passed to the decedent's estate. The spouse, as executor, transferred one-third of the IRA to another IRA in the name of the decedent but with one of the decedent's children as remainder beneficiary. The IRS ruled that the minimum required annual distributions from the IRA were to be calculated using the decedent's remaining life expectancy which was used by the decedent prior to death. **Ltr. Rul. 200850058, Sept. 15, 2008**.

SPLIT-DOLLAR LIFE INSURANCE. The trustees of two irrevocable trusts entered into a split-dollar life insurance agreement under which the trustees purchased one single-life insurance policy on the life of the settlor and entered into an agreement to share ownership of the policy. Under the agreement, the trustees had the right, independently and with respect to its interest in the policy, to: (1) designate beneficiaries; (2) select settlement options; (3) assign the trust's interest in the policy and the agreement; (4) make withdrawals; and (5) obtain a loan from the insurance company. All other ownership rights had to be exercised by mutual agreement. The IRS ruled that the agreement did not result in taxable gifts so long as the amounts paid by the trusts were at least equal to the amounts required by *Rev. Rul. 64-328, 1964-1 C.B. 11, Rev. Rul. 66-110, 1966-1 CB 12, and Notice 2002-8, 2002-1 CB 398*. **Ltr. Rul. 200851013, Sept. 9, 2008**.

FEDERAL INCOME TAXATION

BUSINESS EXPENSES. The taxpayer conducted a self-employed architecture consulting business and incurred telephone and travel expenses for which the taxpayer claimed business deductions. The telephone expenses and a portion of the travel expenses were not allowed as deductions because the taxpayer did not keep sufficient records to distinguish the business and personal nature of the phone calls and travel. **Shafrir v. Comm'r, T.C. Memo. 2008-280**.

CHARITABLE DEDUCTIONS. The taxpayers paid tuition and other fees to religious schools for their children. The schools provided state-required secular education as well as education about the religion. The taxpayers argued that the tuition amount paid for religious education was eligible for a charitable contribution deduction. The court held that the amounts paid had no gift intent because the amounts were paid in exchange for the secular and religious education of the children and did not exceed the reasonable cost of a private school education. **Sklar v. Comm'r, 9th Cir. 2008), *aff'g*, 125 T.C. 281 (2005)**.

CORPORATIONS

ACCOUNTING METHOD. A parent corporation timely filed its consolidated federal income tax return for the tax year, along with the original of the Form 3115, Application for Change in Accounting Method, filed under *Rev. Proc. 2002-9, 2002-1 C.B. 32* on behalf of one of its subsidiaries so that the subsidiary could change its accounting method for its inventory. However, a CPA inadvertently failed to submit the copy of the parent corporation's Form 3115 to the IRS national office by the due date of the return. The IRS granted an extension of time to file the copy of Form 3115 with the IRS national office. **Ltr. Rul. 200851019, Sept. 15, 2008**.

CONSTRUCTIVE DIVIDENDS. The taxpayers, husband and wife, incorporated their eldercare business but did not file a Form 1120 income tax return for the corporation. In 2007, the IRS assessed the corporation for payroll taxes for 2002. The taxes were paid by the taxpayers personally in 2007. The corporation sought to deduct the taxes on its 2002 return but the court held that, because the corporation had not filed a return yet, it was deemed to be on the cash method of accounting and could deduct the taxes only in the year actually paid. Because no employment tax was paid in 2002, the taxpayers received a constructive dividend in that year. **Bascos v. Comm'r, T.C. Memo. 2008-294**.

REORGANIZATIONS. The IRS has issued guidance that describes methodologies that it is considering publishing as safe harbors to be used in the determination of basis in stock that is acquired in an I.R.C. § 368(a)(1)(B) ("type B") reorganization or other transferred-basis transaction. The methodologies are intended to respond to issues raised as a result of substantial changes in market practice since the issuance of R*ev. Proc. 81-70, 1981-2 C.B. 729*. A "type B" reorganization is the acquisition by one corporation of the stock of a target corporation, solely in exchange for the voting stock of the acquiring corporation or its parent, if immediately after the exchange the acquiring corporation is in control of the target. Under I.R.C. § 362, if a corporation acquires property in a transferred-basis transaction, including a "type B" reorganization or an I.R.C. § 351 transfer from controlling stockholders, the property so acquired keeps the same basis as it had in the hands of the transferor. The IRS issued *Rev. Proc. 81-70* to facilitate the determination of basis in "type B" reorganizations due to two problems encountered by taxpayers in attempting to establish basis in acquired stock: (1) the acquisition of basis information from target corporation shareholders surrendering stock of widely held corporations was time-consuming, burdensome, and costly; and (2) not all surrendering shareholders were responding to requests for basis information. *Rev. Proc. 81-70* provides guidelines for the use of statistical sampling techniques and estimation techniques to determine the basis of stock acquired in a B reorganization where the burden of obtaining the actual basis figures is unreasonable. **Notice 2009-4, I.R.B. 2009-2**.

WORTHLESS STOCK. The taxpayer disposed of stock at a time when the taxpayer did not believe the stock was worthless. In a Chief Counsel Advice letter the IRS discussed the role of abandonment as proof that an asset was worthless. The letter indicates that, although the abandonment of an asset is a factor in determining worthlessness of an asset, the abandonment of an asset is not the only factor for determining worthlessness and is not a necessary factor in determining worthlessness. The letter cites *Echols v. United States , 950 F.2d 209 (5th Cir. 1991)* and several other cases in support. **CCA Ltr. Rul. 200851050, Oct. 27, 2008**.

COURT AWARDS AND SETTLEMENTS. The taxpayer filed suit for false imprisonment against a bank and auto dealer resulting from disagreements surrounding an auto purchase that resulted in false criminal charges and imprisonment of the taxpayer. The taxpayer made no claim of physical injury although the taxpayer claimed emotional distress, mortification, humiliation, mental anguish and damage to reputation. The parties entered into a settlement under which the taxpayer received payment in settlement for all claims. The taxpayer's attorney and the bank told the taxpayer the settlement proceeds were nontaxable and the taxpayer excluded the proceeds from taxable income. The court held that the settlement proceeds were taxable income because the taxpayer made no claims for physical injury. The court noted that physical restraint and detention were not physical injuries. **Stadnyk v. Comm'r, T.C. Memo. 2008-289**.

DEPENDENTS. In a 2004 tax return, the taxpayer claimed a dependency exemption deduction and child tax credit for three children. The taxpayer provided some support for the children in 2004 but did not live with the children during the year and did not live with the children's mother during the tax year. The mother had sole custody. The mother did not sign a written declaration that she would not claim any of the children as dependents for 2004. The court held that the taxpayer could not claim a dependency exemption deduction and child tax credit for any of the three children. **Barrett v. Comm'r, T.C. Memo. 2008-284**.

DISASTER LOSSES. On October 3, 2008, the president determined that certain areas in New Hampshire are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe storms and flooding, which began on September 6, 2008. **FEMA-1799-DR.** Taxpayers who sustained losses attributable to these disasters may deduct the losses on their 2007 returns.

GIFTS. The taxpayer lived with an artist who paid the taxpayer $10,500 in one tax year, although the taxpayer did not perform any services for the artist related to the artist's work. The two were romantically involved. The artist filed a Form 1099-MISC listing the payments and the srtist deducted the payments as wage expense on the artist's income tax return. The court held that the amount paid was not income to the taxpayer because the amounts were gifts paid with "detached and disinterested generosity" due to the artist's affection for the taxpayer. The court noted that the taxpayer and artist had conflicting interests in characterizing the amounts paid and found the taxpayer's testimony to be more reliable and believable. **Yang v. Comm'r, T.C. Summary Op. 2008-156**.

HOBBY LOSSES. The court held that the taxpayers did not engage in their direct marketing activity with the intent to make a profit because (1) they did not keep complete and accurate records, (2) the records were insufficient to make decisions about the profitability of the operation, (3) the taxpayers did not make any changes to make the operation profitable, (4) the taxpayers did not have any expertise in direct marketing activities, (5) the activity had no profits, and (6) the taxpayers received personal advantage and pleasure from the activity. **Kinney v. Comm'r, T.C. Memo. 2008-287**.

IRA. The taxpayer received a distribution from a qualified retirement account before the taxpayer reached 59 1/2 years of age. The taxpayer became disabled during the tax year of the distribution and the funds were used to pay mortgage and medical expenses. In April of the tax year, the taxpayer filed a disability application, and in December of the tax year, the taxpayer was determined to have become disabled during the tax year by the Social Security Administration for social security benefits purposes. The SSA determination was issued after the distribution from the IRA, The court held that the taxpayer was not liable for the 10 percent penalty for early withdrawal because the taxpayer became disabled prior to the distribution. The court noted that the evidence of disability was submitted to the SSA prior to the distribution. **Dart v. Comm'r, T.C. Summary Op. 2008-158**.

The taxpayer inherited the proceeds of two IRAs from a deceased aunt. The proceeds were deposited in a savings account and not transferred to any IRA account in the taxpayer's name. The taxpayer did not include the amounts in gross income and was assessed a deficiency. The taxpayer argued that substantial compliance was attempted because the taxpayer had told the IRA trustees that the taxpayer wanted a nontaxable distribution of the funds. The court noted that the taxpayer provided no additional evidence of any attempts to complete a rollover of the IRA funds to an IRA in the taxpayer's name or that the failure to transfer the funds to an IRA was based on an error of any bank or IRA trustee; therefore, no substantial compliance was attempted and the funds were taxable to the taxpayer. **Jankelovits v. Comm'r, T.C. Memo. 2008-285**.

The taxpayer received an early distribution from an IRA in a year when the taxpayer was unemployed and had high medical expenses. The taxpayer reported the distribution as income but did not pay the 10 percent penalty for early withdrawals. The taxpayer argued that a financial hardship exception should be implied in the 10 percent additional tax exceptions that are specifically allowed. The court refused to read such an exception into I.R.C. § 72(t) and held that the early distribution was subject to the 10 percent additional tax. **Best v. Comm'r, T.C. Summary Op. 2008-160**.

INNOCENT SPOUSE. The taxpayer and spouse invested in a limited partnership and both became partners. The taxpayer filed a joint return for several years in which partnership losses and investment credit pass-throughs were claimed on the returns. The partnership was audited and many of the losses and credits were disallowed, resulting in tax deficiencies on the taxpayer's returns. The taxpayer sought innocent spouse relief, claiming that the taxpayer did not know about the understatement of tax. However, in the administrative appeal the appeals officer ruled that the taxpayer did not meet two other criteria for innocent spouse relief. The court held that, because the taxpayer failed to contest the ruling as to these other criteria, innocent spouse relief was properly denied. **Golden v. Comm'r, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,101 (6th Cir. 2008), *aff'g*, T.C. Memo. 2005-170 and T.C. Memo. 2007-299**.

LEVY. The IRS has issued Publication 1494, Table for Figuring Amount Exempt From Levy on Wages, Salary, and Other Income (Forms 668-W(c), 668-W(c)(DO), 668-W(ICS)) used to collect delinquent tax in 2009. **Notice 2008-114, 2008-2 C.B. 1322**.

LIENS. The IRS has announced that it has allocated additional resources to an expedited process for the removal or subordination of federal tax liens on personal residences where the house is sold under a short sale or is being refinanced. IRS Publication 784, How to Prepare Application for Certificate of Subordination of Federal Tax Lien, is to be used to start the request for subordination of a federal tax lien. Use IRS Publication 783, Instruction on how to apply for Certificate of Discharge of Property from Federal Tax Lien, for the discharge request. **IR-2008-141**.

LIFE INSURANCE. In 1958, the taxpayer purchased a life insurance policy which provided for a cash surrender value and loan privileges. The taxpayer borrowed against the cash surrender value and the interest on the loans was added to the principal as the interest became due so that eventually the loan amount exceeded the cash surrender value. The policy was terminated when the loan amount exceeded the cash surrender value under the terms of the policy. The insurance company sent the taxpayer a form entitled "Surrender of Policy for Cash Value" with a check for the difference of the cash surrender value over the loan amount. The taxpayer signed the form and cashed the check. The insurance was terminated and the insurance company sent to the taxpayer Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., reflecting a gross distribution of $29,933.78 and a taxable amount of $21,248.18. The difference between the gross distribution and the taxable amount was $8,685.60, the total amount taxpayer had paid in premiums on the policy. The taxpayer argued that no income was recognized because the insurance policy was terminated and not surrendered, since the taxpayer was forced to end the policy by the insurance company.

The court held that the distinction between termination and surrender of the policy was not relevant here because the taxpayer's eligibility for deferral of recognition of income from the policy loan ended when the policy ended, thus resulting in recognition of the deferred income. **Reinert v. Comm'r, T.C. Summary Op. 2008-163**.

LIMITED LIABILITY COMPANIES. A tax-exempt health care organization owned a single-owner limited liability company which elected not to be taxed as a corporation for federal tax purposes, thus becoming a disregarded entity. The organization had a retirement plan for its employees which was restricted to employees of a tax-exempt organization. The IRS ruled that the employees of the LLC were eligible to participate in the retirement plan because the health care organization was treated as the owner of the LLC. **Ltr. Rul. 200851044, Sept. 24, 2008**.

MEDICAL EXPENSES. The taxpayer fathered two children using in vitro fertilization method. The eggs were provided by unrelated women and the fertilized embryo was gestated in an unrelated woman. The taxpayer claimed medical deductions for the costs of the medical procedures, including legal fees for the egg donors and gestation carriers. The taxpayer was found to be fertile and under no physical or mental condition to prevent normal procreation. The court held that the expenses were not deductible medical expenses because they were not incurred in the treatment of a medical condition or for the purpose of affecting a structure or function of the taxpayer's body. **Magdalin v. Comm'r, T.C. Memo. 2008-293**.

PASSIVE ACTIVITY LOSSES. The taxpayers are married individuals who filed their tax returns jointly. The taxpayers represented that in one tax year they were in a real property business as defined by I.R.C. § 469 and were qualified under I.R.C. § 469(c)(7)(B) to make an election to treat all interests in rental real estate as a single rental real estate activity; however, the taxpayers filed their joint return for the year without the information statement required under Treas. Reg. § 1.469-9(g)(3). The IRS granted the taxpayers an extension of time to file an amended return with the required statement. **Ltr. Rul. 200851001, Sept. 10, 2008**.

PENSION PLANS. The IRS has published a revenue ruling providing tables of covered compensation under I.R.C. § 401(l)(5)(E) and the regulations, thereunder, for the 2009 plan year. For purposes of determining covered compensation for the 2009 year the taxable wage base is $106,800. **Rev. Rul. 2009-2, I.R.B. 2009-2**.

QUALIFIED TUITION PROGRAMS. The IRS has published an amendment to the provisions of *Notice 2001-55, 2001-2 C.B. 299*, to provide that a qualified tuition program does not violate the investment restriction under I.R.C. § 529(b)(4) if it permits a change in the investment strategy selected for a Section 529 account twice per calendar year for calendar year 2009, as well as upon a change in the designated beneficiary of the account, subject to the program requirements as detailed in *Notice 2001-55*. The Treasury Department and the IRS expect that final regulations will incorporate this special rule for 2009. **Notice 2009-1, I.R.B. 2009-2**.

SAFE HARBOR INTEREST RATES

January 2009

	Annual	Semi-annual	Quarterly	Monthly
Short-term				
AFR	0.81	0.81	0.81	0.81
110 percent AFR	0.89	0.89	0.89	0.89
120 percent AFR	0.97	0.97	0.97	0.97
Mid-term				
AFR	2.06	2.05	2.04	2.04
110 percent AFR	2.27	2.26	2.25	2.25
120 percent AFR	2.48	2.46	2.45	2.45
Long-term				
AFR	3.57	3.54	3.52	3.51
110 percent AFR	3.93	3.89	3.87	3.86
120 percent AFR	4.30	4.25	4.23	4.21

Rev. Rul. 2009-1, I.R.B. 2009-2.

SALE OF CAPITAL ASSETS. The taxpayer owned commercial property through a land trust which was treated as the owner of the property for federal tax purposes. The taxpayer sold the property to two buyers. The first buyer purchased a 50-year interest in the property and had all benefits and burdens of ownership and was free to sell, assign, encumber or otherwise dispose of the buyer's interests in the property. The second buyer purchased the remainder interest in the property and was free to sell, assign, encumber or otherwise dispose of the buyer's interests in the property. The IRS ruled that the two sales constituted a sale of the taxpayer's entire interest in the property and that I.R.C. § 1231, gain or loss would be recognized from the sale. No ruling was made as to the characterization of the property under I.R.C. § 1245 or 1250. The land trust was similar to that described in *Rev. Rul. 92-105*. See Harl, "Can Trust Beneficiaries Use Section 1031 Like-Kind Exchanges?" 18 *Agric. L. Dig*. 97 (2007). **Ltr. Rul. 200850009, Aug. 6, 2008; Ltr. Rul. 200850010, Aug. 6, 2008**.

SELF-EMPLOYMENT INCOME. In a Chief Counsel Advice letter, the IRS ruled that fees received by judges who performed weddings for a fee during off-duty hours were self-employment income to the judges. **CCA Ltr. Rul. 200851047, Oct. 28, 2008**.

TAX RETURN PREPARERS. The IRS has adopted as final regulations providing that an income tax return preparer located in the United States may not disclose a taxpayer's social security number (SSN) to a tax return preparer located outside of the United States even if the taxpayer consents to the disclosure. The final regulations create a limited exception that a tax return preparer located within the United States, including any territory or possession of the United States, may obtain consent to disclose the taxpayer's SSN to a tax return preparer located outside of the United States or any territory or possession of the United States only if the tax return preparer discloses the SSN through the use of an adequate protection safeguard (to be defined by the Secretary in I.R.B. guidance) and verifies the maintenance of adequate data-protection safeguards in the request for the taxpayer's consent. **73 Fed. Reg. 76216 (Dec. 16, 2008)**.

I.R.C. § 6694(a) imposes a penalty on a tax return preparer who prepares a return or claim for refund reflecting an understatement of liability due to an "unreasonable position" if the tax return preparer knew (or reasonably should have known) of the position. No penalty is imposed, however, if it is shown that there is reasonable cause for the understatement and the tax return preparer acted in good faith. Prior to the 2008 Act, under the standards of conduct implemented by I.R.C. § 6694(a), a position would be treated as unreasonable unless (i) there was a reasonable belief that it would more likely than not be sustained on the merits, or (ii) the position was properly disclosed and had a reasonable basis. The 2008 Act revised I.R.C. § 6694(a) to provide that a position would be treated as unreasonable unless (i) there is or was substantial authority for the position or (ii) the position was properly disclosed and had a reasonable basis. The IRS has issued guidance for application of the tax return preparer penalty under I.R.C. § 6694(a), as amended by the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008). **Notice 2009-5, I.R.B. 2009-3**.

The IRS has adopted as final regulations governing the federal tax (including income, estate, gift, employment, excise and exempt organization returns) return preparer penalties under I.R.C. §§ 6694 and 6695. **73 Fed. Reg. 78429 (Dec. 22, 2008)**.

The IRS has published a revenue procedure identifying the relevant categories of tax returns and claims for refund for purposes of the tax return preparer penalty under I.R.C. § 6694 and identifying the returns and claims for refund required to be signed by a tax return preparer under regulations in order to avoid a penalty under I.R.C. § 6695(b). **Rev. Proc. 2009-11, I.R.B. 2009-3**.

TAX SHELTERS. The taxpayers had invested $5,000 cash and a promissory note for $9,250 in a 6.67 percent partnership interest in a jojoba limited partnership. The taxpayers claimed over $12,000 in losses as their share of the partnership losses. The partnership was determined to be not entitled to the losses and the taxpayers were also denied the use of the losses. In this case, the taxpayers were found to have failed to use due care in making the investment in that the taxpayers failed to make any investigation into the propriety of the losses other than the information supplied by the partnership promoter. The court noted that the information provided to the taxpayers included numerous disclaimers as to the unreliability of the tax claims and the taxpayer should have realized that the generous tax benefits were sufficiently suspicious to warrant further investigation, more than the reliance on the advice of the partnership promoter. **Altman v. Comm'r, T.C. Memo. 2008-290**.

THEFT LOSSES. The taxpayer claimed a theft loss deduction on several tax returns of $10 million for the theft and casualty loss of a stamp collection, U.S. savings bonds and other personal property. Although the taxpayer alleged that the items were either stolen or lost in a flood, the taxpayer provided no credible evidence to support the allegations and even admitted that the $10 million amount was an estimate. The court held that the IRS properly disallowed the deductions for lack of substantiation. **Mayewsky v. Comm'r, T.C. Memo. 2008-286**.

NEGLIGENCE

FARM IMPLEMENTS. The plaintiff's decedent was killed when the decedent's truck struck a tiller towed on the highway by the defendant. The tiller was wider than the highway lane and evidence included measurements of the highway and the tiller, testimony of an accident reconstructionist as to the position of the vehicles at the time of the accident, the available space for the tiller off the road, and evidence as to the time of the accident. The jury found for the defendant. The plaintiff sought a new trial on the grounds that the jury's verdict was against the weight of the evidence. The major issue was whether the defendant was required, under Okla. Stat. tit. 47, § 12-201(B), to have lights on the tiller facing forward because the tiller was being towed more than 30 minutes after sunset. The court found that the evidence supported the finding that sunset occurred at 7:47 p.m. and the defendant reported the accident by cell phone call at 8:12 p.m. The court also noted evidence of one of the medical responders who was working at 8:22 p.m. without the need for artificial lighting. Therefore, the court held that the jury verdict was supported by substantial evidence that the plaintiff's decedent had sufficient light to see the tiller and had sufficient room on the highway to avoid the tiller. **Welch v. Cabelka, 2008 U.S. App. LEXIS 24959 (10th Cir. 2008)**.

SECURED TRANSACTIONS

FARM PRODUCTS. The plaintiff bank loaned a cotton farmer money and was granted a security interest in "all crops, annual or perennial, growing or to be grown." The security agreement and financing statement both included an attached exhibit describing the cotton crop of the farmer; however, the exhibit did not identify the record owner of the land on which the crop was grown and the farmer was not the owner of the land. The bank notified the gin by letter of the claimed security interest in the farmer's cotton crop but failed to include documentation. The president of the gin testified that the letter was received and that the farmer had admitted owing money to the bank. The crop was sold to the defendant cotton gin which deducted amounts borrowed from it and a related supplier before issuing a check jointly to the farmer and the bank. The bank sued for recovery of the deducted amount, arguing that it had a prior perfected security interest in the cotton. The gin argued that omission of the record owner of the crop land, as required by Ga. Code § 11-9-502(b)(4), failed to perfect the security interest. The court held that the gin had actual knowledge of the bank's security interest in the cotton crop and could not acquire the crop free of that security interest; therefore, the gin could not deduct the amounts owed by the farmer to the gin. **Bank of Dawson v.**

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Worth Gin Co., Inc., 2008 Ga. App. LEXIS 1350 (Ga. Ct. App. 2008).