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# Agricultural Law Digest

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# Worker, Homeownership, and Business Assistance Act of 2009

-by Neil E. Harl*

One of the shortest tax bills in modern time, containing only 18 provisions, passed the Congress and was signed into law on November 6, 2009.[1] Notwithstanding its brevity, the legislation contains some very significant provisions for workers, homeowners and businesses.

**Credits for Home Ownership**

Under the Housing Assistance Tax Act of 2008,[2] a taxpayer who was a first-time home buyer was eligible for a 10-percent (of the purchase price) refundable credit equal to the lesser of $7,500 ($3,750 for a married taxpayer filing separately) or 10 percent of the purchase price of a principal residence.[3] The credit phased out for individual taxpayers with modified adjusted gross income in the year of purchase between $150,000 and $170,000 for joint filers, $75,000 to $95,000 for those married filing separately.[4] The credit was recaptured over 15-years with no interest charge beginning in the second taxable year after the taxable year in which the home was purchased.[5] In the event the taxpayer sold the home or the home ceased to be used as the principal residence of the taxpayer or the taxpayer's spouse, before complete repayment of the credit, any remaining credit amount was due on the return for the year the home was sold or ceased to be used as the principal residence.[6] The provision was effective for qualifying home purchases on or after April 9, 2008, and before December 1, 2009.[7]

In 2009, Congress passed and the President signed the American Recovery and Reinvestment Act of 2009[8] which increased the maximum 10 percent first-time home buyer tax credit from $7,500 to $8,000.[9] The Act also eliminated any required repayment after 36 months in the home for any credit allowed for the purchase of a principal residence after December 31, 2008 and before December 1, 2009,[10] the date set for termination of the first-time home buyer credit program.[11] The phase-out continued at the same levels for the credit authorized in 2009.

The legislation signed on November 6, 2009[12] extended the $8,000 tax credit for first-time home buyers through April 30, 2010.[13] The new legislation also authorizes a reduced credit of $6,500 for individuals (and, if married, the individual's spouse) who have owned and used the same residence as their principal residence for any five consecutive-year period

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during the eight year period ending on the date of purchase of a subsequent principal residence.[14] The individual or individuals are considered to be a first-time home buyer.[15] The income phase-out is changed from $75,000/ $150,000 to $125,000/ $225,000.[16] The new law specifies that the purchase price of the residence cannot exceed $800,000[17] and the purchaser must have attained the age of 18-years unless the taxpayer is married and one of the spouses meets the age requirement.[18] The new rules also provide that the residence cannot be acquired from the spouse's family by gift or inheritance (where the income tax basis carries over), in addition to the related party limitations in the earlier enactment.[19] Special rules apply to military personnel.

**Five-year Carryback of Net Operating Losses**

The American Recovery and Reinvestment Act of 2009[20] provided for a three, four or five year carryback of 2008 net operating losses (the choice was up to the taxpayer) but only for qualified small businesses with average gross receipts of $15 million or less.[21]

Under the legislation signed into law on November 6, 2009, law, for net operating losses for a taxable year ending after December 31, 2007 and beginning before January 1, 2010 (basically 2008 and 2009), the net operating loss by election can be carried back as many as five years and is open to all businesses (except for those receiving funds under the Troubled Asset Relief Program -- TARP--if the federal government acquired or had the right to acquire an equity interest in the firm).[22] However, an election may be made *for only one taxable year*.[23] For elections to carry back the NOL to the fifth taxable year preceding the taxable year of the loss, the amount of NOL is limited to 50 percent of the taxpayer's taxable income for all except for elections by small businesses.[24]

These provisions do not apply to farming losses[25] Farming losses have been eligible for five year carryback since 1998.[26]

**Failure to File Penalty for S Corporation and Partnership Returns**

The legislation raises the penalty for failure to file an S corporation or partnership return from $89 to $195 per shareholder or partner per month for a maximum of 12 months. The change is effective for tax years beginning after December 31. 2009.[27]

**Mandatory E-Filing**

Tax return preparers, except for those expecting to file 10 or fewer individual income tax returns during the calendar year, are required to e-file the returns, effective for returns filed after 2010.[28] This applies to taxes imposed by subtitle A of the Internal Revenue Code (income tax).[29]

**FUTA surtax**

The new law extends the 0.2 percent FUTA surtax through 2010 and for the first six months of calendar year 2011.[30] Thus, the 6.2 percent rate will continue into the first half of 2011.

**Unemployment Benefits**

The legislation provides 14 additional weeks of unemployment benefits to all unemployed workers who exhaust their benefits and six additional weeks of benefits to unemployed workers who exhaust their benefits in states with 8.5 percent unemployment or more.[31]

**ENDNOTES**

1 H.R. 3548, Worker, Homeownership, and Business Assistance Act of 2009, 111th Cong., 1st Sess. (2009), an Act to amend the Supplemental Appropriations Act of 2008, Pub. L. No. 110-252, 122 Stat. 2323 (2008).

2 Pub. L. No. 110-289, § 3011(a), 122 Stat. 2888 (2008).

3 I.R.C. § 36(a). See IR 2008-106. The credit was claimed on Form 5405.

4 I.R.C. § 36(b)(2).

5 I.R.C. § 36(f), (f)(7).

6 *Id*.

7 I.R.C. § 36(h).

8 Pub. L. No. 111-5, 123 Stat. 115 (2009).

9 I.R.C. § 36(b)(1).

10 I.R.C. § 36(f)(4)(D).

11 I.R.C. § 36(h).

12 See note 1 *supra*.

13 I.R.C. § 36(h), amended by H.R. 3548, 111th Cong., 1st Sess. (2009).

14 I.R.C. § 36(c)(6).

15 *Id*.

16 I.R.C. § 36(b)(2)(A)(I)(II).

17 I.R.C. § 36(b)(3).

18 I.R.C. § 36(b)(4).

19 I.R.C. § 36(c)(3)(A)(I). The age and spousal family provisions are effective for homes purchased after November 6, 2009, the date of enactment.

20 Pub. L.No. 111-5, 123 Stat. 115 (2009).

21 I.R.C. § 172(b)(1)(H).

22 I.R.C. § 172(b)(1)(H).

23 I.R.C. § 172(b)(1)(H)(iii)(I).

24 I.R.C. § 172(b)(1)(H)(iv).

25 I.R.C. § 172(b)(1)(F)(ii).

[26] Pub. L. No. 105-277, § 2013, 112 Stat. 2681-887 (1998).

[27] I.R.C. §§ 6698(b)(1), 6699(b)(1).

[28] I.R.C. § 6011(e)(3).

[29] I.R.C. § 6011(e)(3)(C).

[30] I.R.C. § 3301.

[31] H.R. 3548, Secs. 2 - 9, 111th Cong., 1st Sess. (2009).

# CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

## BANKRUPTCY

### GENERAL

**ESTATE PROPERTY.** The debtor had established a college savings account for the debtor's child. The debtor deposited $14,500 into the account and filed a Chapter 7 bankruptcy petition two weeks later. The debtor's parent had also contributed $40,000 to the account. The Chapter 7 trustee sought turnover of the account belance as estate proeprty. The court held that the account funds were estate property and not eligible for any exclusion. The next issue of the *Digest* will publish an article on this case by Neil E. Harl. ***In re* Bourguignon, 2009-2 U.S. Tax Cas. (CCH) ¶ 50,717 (Bankr. D. Idaho 2009)**.

### CHAPTER 12

**AUTOMATIC STAY.** The debtors had filed a previous Chapter 12 case which was dismissed after the debtors failed to make payments to the trustee. Upon dismissal of the case, a creditor sought to sell farm land collateral held by the debtors. The parties reached an agreement under which the debtors would make all payments in default and pay all real property taxes owed on the property. The debtors made the back payments but failed to pay the taxes. The debtors filed for Chapter 12 again just before the property was to be sold in a trustee's sale. The creditor sought relief from the automatic stay, arguing that the debtors had no equity in the property, did not need the property for a successful reorganization and had improperly filed the case within 180 days of dismissal of the previous Chapter 12 case. The court held that the 180-day rule did not apply because the creditor failed to show that the debtors willfully failed to abide the orders of the bankruptcy court. The court also found that the debtors did have equity in the property, even when the back taxes, attorney's fees and other charges were added. The court denied relief from the automatic stay, noting that the creditor was adequately protected and that the debtors had shown good faith in making all the back payments. The court also noted that the decision was close because the debtors had promised payment of the taxes when the debtor knew that they would not be able to make those payments, but the court gave more weight to the debtors' payment of all defaulted payments. ***In re* Jochem, 2009 Bankr. LEXIS 3424 (Bankr. D. Neb. 2009)**.

**PLAN.** The debtor was divorced pre-petition and the divorce decree awarded the debtor farmland and farm buildings. The former spouse was awarded almost $400,000. During the appeal of the divorce decree, the debtor filed for Chapter 12 and the Chapter 12 plan provided for payment of the divorce decree award to the former spouse over 30 years with a 10 year balloon and at 5.25 percent interest. The spouse objected to the plan because the debtor failed to show that the plan was feasible since the income projections were not consistent with the income history of the farm. The court held that the plan would not be confirmed because (1) the income projections were inconsistent with the history of income; (2) the debtor has failed to pay the divorce judgment despite the substantial equity in the farm property; (3) installment payment of the divorce judgment was unfair to the spouse because of the inherent risks in farming which could produce insufficient income to make plan payments; and (4) the plan did not provide for payment of the attorney's fees awarded in the divorce decree. The court indicated that no plan would be confirmed unless it provided for some immediate payment of the divorce judgment. ***In re* Melcher, 2009 Bankr. LEXIS 3423 (Bankr. D. Neb. 2009)**.

## FEDERAL FARM PROGRAMS

**BRUCELLOSIS**. The APHIS has adopted as final regulations amending the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Montana from Class A to Class Free. **74 Fed. Reg. 57245 (Nov. 5, 2009)**.

## FEDERAL ESTATE AND GIFT TAXATION

**ESTATE TAX LIEN**. In a Chief Cousel Advice Letter, the IRS stated that, if a qualified heir's taxpayer identification number is not included on From 706 which makes a special use valuation election, the Service should obtain and place, in redacted form, the TIN on Form 668H lien on Section 2032A property. If the qualified heir is a trust, the Form 668H should also include the

name of the trust, the redacted TIN, and the name of the trustee. No TIN of the owner of the trust is required because the owner has no personal liability for the tax. **CCA Ltr. Rul. 200944036, Aug. 25, 2009**.

**TRUSTS**. The taxpayer created an irrevocable trust for the benefit of the taxpayer, spouse and descendants. A trust company served as trustee. The remainder beneficiaries were the taxpayer's descendants or a charitable organization. The taxpayer retained the right to withdraw trust property and exchange it for property of an equivalent value. The trustee had to verify the equivalent value of the substituted property. The trustee could not distribute trust income or principal for payment of the taxpayer's income tax liability from the trust. The IRS ruled that the taxpayer's right to substitute property in the trust would not cause the trust property to be included in the taxpayer's estate. The IRS also ruled that contributions to the trust by the taxpayer were completed gifts because the taxpayer did not retain any rights to change the beneficiaries or the interests of the beneficiaries. **Ltr. Rul. 200944002, July 15, 2009**.

# FEDERAL INCOME TAXATION

## C CORPORATIONS

CONSTRUCTIVE DIVIDENDS. The taxpayer owned a retail carpet business operated through a C corporation and LLC. The IRS assessed tax deficiencies on the corporation, LLC and taxpayer for unreported income, including constructive dividends to the taxpayer for checks from the corporation or LLC to the taxpayer's personal accounts. The IRS assessments were based on the taxpayer's, corporation's and LLC bank account records. The taxpayer challenged the IRS assessments by claiming that the money was transferred as part of an escrow arrangement to force vendors to not cash checks prior to the date on the checks. The court did not accept this explanation and held that the funds transferred were constructive income to the taxpayer. **Enayat v. Comm'r, T.C. Memo. 2009-257**.

**CONSTRUCTIVE RECEIPT OF INCOME**. The taxpayer filed an income tax return on the calender year basis. The taxpayer's employment was terminated when the taxpayer's employer company was merged with another company. The taxpayer filed a request for distribution of funds in a deferred compensation plan. The check was sent on December 31 to the employer's office which was closed on that day. However, an employee of the company in another office informed the taxpayer on December 31 that the check had arrived. The taxpayer was able to obtain the check on the following January 2. The IRS ruled that the taxpayer did not have constructive receipt of the check on December 31 and that the funds were income in the following tax year. **Ltr. Rul. 200945005, July 28, 2009**.

**DISASTER LOSSES.** On October 24, 2009, the President determined that certain areas in Puerto Rico are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of explosions and fire which began on October 23, 2009. **FEMA-3306-EM.** Accordingly, taxpayers in the areas may deduct the losses on their 2008 federal income tax returns. See I.R.C. § 165(i).

**DEPRECIATION.** The taxpayers were a corporation and limited liability company which purchased three aircraft leased to related entities. The taxpayers sought eligibility of the aircraft for exemption from the annual depreciation limitation of I.R.C. § 280F(c)(1). The IRS ruled that the aircraft were not eligible for the exemption because the taxpayers' companies were not regularly engaged in the business of leasing the aircraft because the leases were with only two related lessees and were multi-year leases. The IRS also ruled that the aircraft were not eligible for accelerated depreciation because none of the uses of the aircraft met the 50-percent qualified business use test of I.R.C. § 280F(b). The IRS ruled that any use by a 5-percent owner or related person is excluded from consideration under the 25-percent threshold test. In addition, maintenance flights had to be allocated ratably between personal and business uses; therefore, because the personal use exceeded 75 percent, the maintenance flights could not be included in the qualified business use. **Ltr. Rul. 200945037, July 29, 2009**.

**INNOCENT SPOUSE**. The taxpayer had originally filed two income tax returns as married filing separately, correctly reporting the taxpayer's income and paying the tax due. The taxpayer and spouse divorced and the divorce decree required the taxpayer and former spouse to file amended returns for those two years under the married filing jointly status. The decree also required the taxpayer to pay half of the tax liability from the amended returns. The joint returns were filed but the former spouse did not pay any of the taxes owed, which the court acknowledged resulted exclusively from the former spouse's income. The taxpayer sought innocent spouse relief from the unpaid taxes, under I.R.C. § 6015(b) and equitable spouse relief under I.R.C. § 6015(f). The court noted that more of the factors of *Rev. Proc. 2003-61, 2003-2 C.B. 296* weighed in the taxpayer's favor but held that the taxpayer was entitled to relief only from the former spouse's share of the tax liability. The court gave greatest weight to the divorce decree which required the taxpayer to pay half of the tax liability. The taxpayer was entitled to relief from the former spouse's half of the tax liability because the taxpayer had no knowledge or reasonable belief that the former spouse would not pay the former spouse's half of the taxes, since the taxpayer had paid the former spouse more than enough money to pay the taxes. **Bruen v. Comm'r, T.C. Memo. 2009-249**.

The taxpayer had successfully challenged an IRS denial of innocent spouse relief from taxes owed by the taxpayer and former spouse. The taxpayer sought recovery of administrative and litigation costs, under I.R.C. § 7430(a), based on the court ruling that the taxpayer was entitled to equitable innocent spouse relief. The court held that the taxpayer did not qualify as the prevailing party because the

IRS position in the case was substantially justified. The court noted that the decision was based in large part on the court's decision to accept testimony of the taxpayer as true and to make various factual determinations. In addition, the taxpayer's actions to make the taxpayer collection proof raised reasonable suspicions for the IRS to challenge the innocent spouse relief. **Wiener v. Comm'r, T.C. Memo. 2009-256**.

The taxpayer had submitted a Form 8857, Request for Innocent Spouse Relief, on January 31, 2008. The IRS sent a final determination denying relief to the taxpayer on July 23, 2008, but the letter was returned as "unclaimed." Another copy was sent to the taxpayer on September 29, 2008, after the taxpayer requested it. The taxpayer filed a petition to review the denial of relief on October 29, 2008, 98 days after the initial determination was mailed. Under I.R.C. § 6015(e), the period for filing a petition was 90 days after the final determination. The court held that the petition was dismissed as untimely because the initial determination was sent to the correct address. **Gormeley v. Comm'r, T.C. Memo. 2009-252**.

**INVOLUNTARY EXCHANGE**. The taxpayer was in the business of owning and leasing commercial rental properties. In the first tax year, a city filed a condemnation action to acquire one of the properties. Although the city placed "probable compensation" in deposit with the state, the taxpayer did not have access to the funds because the taxpayer challenged the condemnation. In the following tax year, the taxpayer and city reached a settlement and stipulation for withdrawal of a portion of the settlement. The taxpayer filed an election to defer the gain under I.R.C. § 1033 on the return for the second tax year. The IRS ruled that the taxpayer did not have constructive receipt of the deposited funds in the first tax year because any claim on the deposit would have waived the taxpayer's right to object to the condemnation. The IRS also ruled that the taxpayer did not have constructive of the deposit until the second tax year and that the taxpayer would have three years after the end of the second tax year to replace the condemned property with qualified replacement property. **Ltr. Rul. 200944012, July 27, 2009**.

**IRA**. The taxpayer' deceased spouse's estate included an IRA which had a trust as beneficiary. The taxpayer was trustee of this trust. The IRS ruled that, under state law, the taxpayer did not have the authority under the trust or state law to withdraw all of IRA funds from the trust. Therefore, the IRS ruled that the IRA would be treated as an inherited IRA and the taxpayer could not rollover the IRA funds to an IRA owned by the taxpayer without recognition of taxable income. **Ltr. Rul. 200944059, Aug. 3, 2009**.

**LIFE INSURANCE.** The taxpayer's parent purchased life insurance on the parent's life. The taxpayer and a sibling were made the owners of the policy and made the premium payments after receiving equal gifts from the parent. The taxpayer stopped making premium payments and the premiums were paid through automatic loans against the policy. The policy was terminated when the policy value still exceeded the loan amount and the taxpayer received a cash payment for the difference, but the insurance company filed a Form 1099-R for the amount of loan paid off less the premiums actually paid. The court held that the amount received upon termination plus the amount of the loan paid less the premiums paid was ordinary income to the taxpayer. The court denied capital gains treatment for the taxable amount because nothing was sold or exchanged in the termination of the policy. **Barr v. Comm'r, T.C. Memo. 2009-250**.

**NON-BUSINESS ENERGY PROPERTY CREDIT**. The non-business energy property credit, a tax credit for making energy efficient improvements to homes, has been increased as part of the American Recovery and Reinvestment Act of 2009. The IRS reminds taxpayers about seven aspects of the non-business energy property credit: (1) The new law increases the credit rate to 30 percent of the cost of all qualifying improvements and raises the maximum credit limit to $1,500 claimed for 2009 and 2010 combined. (2) The credit applies to improvements such as adding insulation, energy-efficient exterior windows and energy-efficient heating and air conditioning systems. (3) To qualify as "energy efficient" for purposes of this tax credit, products generally must meet higher standards than the standards for the credit that was available in 2007. (4) Manufacturers must certify that their products meet new standards and they must provide a written statement to the taxpayer such as with the packaging of the product or in a printable format on the manufacturers' web site. (5) Qualifying improvements must be placed into service after December 31, 2008, and before January 1, 2011. (6) The improvements must be made to the taxpayer's principal residence located in the United States. (7) To claim the credit, attach Form 5695, Residential Energy Credits to either the 2009 or 2010 tax return. Taxpayers must claim the credit on the tax return for the year that the improvements are made. Homeowners who have been considering some energy efficient home improvements may find these tax credits will get them bigger tax savings next year. For more information on this and other key tax provisions of the Recovery Act, visit the official IRS web site at IRS.gov/recovery. **Seven Facts about the Non-business Energy Property Credit, Special Edition Tax Tip 2009-12**.

**PENSION PLANS**. For plans beginning in November 2009 for purposes of determining the full funding limitation under I.R.C. § 412(c)(7), the 30-year Treasury securities annual interest rate for this period is 4.19 percent, the corporate bond weighted average is 6.44 percent, and the 90 percent to 100 percent permissible range is 5.80 percent to 6.44 percent. **Notice 2009-88, I.R.B. 2009-47**.

The IRS has announced relief for sponsors of statutory hybrid plans that must amend the interest crediting rate in those plans. Plan sponsors may rely on this announcement pending publication of the anticipated additional guidance described below. IRS expects to issue in the near future final regulations and proposed regulations relating to statutory hybrid plans. The regulations will include rules interpreting the requirement in I.R.C. § 411(b)(5)(B)(i) that such plans not have an interest crediting rate in excess of a market rate of return. The rules in the regulations specifying permissible market rates of return are not expected

to go into effect before the first plan year that begins on or after January 1, 2011. In addition, it is anticipated that the IRS will exercise the authority under Treas. Reg. § 1.411(d)-4, A-2(b)(2)(i) to provide that, once final regulations regarding the market rate of return requirements are issued, an amendment to a statutory hybrid plan with an interest crediting rate that is in excess of a market rate of return under those final regulations that is adopted prior to the effective date of those final regulations will not violate I.R.C. § 411(d)(6) merely because it reduces the future interest crediting rate on participants' account balances to the extent necessary to constitute a permissible rate under those final regulations. Under this anticipated guidance, I.R.C. § 411(d)(6) will not operate to bar such an amendment, even if the amendment is adopted after the last day of the first plan year that begins on or after January 1, 2009, and therefore is not an amendment described in section 1107 of the Pension Protection Act of 2006 (PPA '06), Pub. L. No. 109-280. Section 1107 of PPA '06 provides, in general, that a plan will not fail to satisfy I.R.C. § 411(d)(6) as a result of amendments that are adopted pursuant to PPA '06 or regulations thereunder by the last day of the first plan year that begins on or after January 1, 2009. Finally, it is anticipated that future guidance will include a special timing rule for providing section 204(h) notice, as defined in Treas. Reg. § 54.4980F-1, Q&A-4, to participants and other applicable individuals with respect to an amendment that changes a statutory hybrid plan's interest crediting rate that is adopted by the last day of the first plan year that begins on or after January 1, 2009 (that is, by the end of the period described in section 1107 of PPA '06) and after November 10, 2009. Under this special timing rule, any required I.R.C. § 204(h) notice relating to such an amendment will be permitted to be provided as late as 30 days after the effective date of the amendment. It is expected that this relief will apply to an amendment only if the amendment is effective not later than the first day of the first plan year that begins on or after January 1, 2010. **Ann. 2009-82, I.R.B. 2009-47**.

**PLUG-IN ELECTRIC VEHICLE CREDIT**. The IRS has published a notice setting forth interim guidance, pending the issuance of regulations, relating to the new qualified plug-in electric drive motor vehicle credit under I.R.C. § 30D, as in effect for vehicles acquired after December 31, 2009. Specifically, the notice provides procedures for a vehicle manufacturer (or, in the case of a foreign vehicle manufacturer, its domestic distributor) to certify to the Internal Revenue Service ("Service") both: (1) that a motor vehicle of a particular make, model, and model year meets certain requirements that must be satisfied to claim the new qualified plug-in electric drive motor vehicle credit under I.R.C. § 30D; and (2) the amount of the credit allowable with respect to that motor vehicle. The notice also provides guidance to taxpayers who purchase motor vehicles regarding the conditions under which they may rely on the vehicle manufacturer's (or, in the case of a foreign vehicle manufacturer, its domestic distributor's) certification in determining whether a credit is allowable with respect to the vehicle and the amount of the credit. The IRS expects that the regulations will incorporate the rules set forth in this notice. I.R.C. § 30D originally was enacted in the Energy Improvement and Extension Act of 2008, Pub. L. 110-343, 122 Stat. 3765. The American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (2009), amended I.R.C. § 30D in certain material respects, effective for vehicles acquired after December 31, 2009. Guidance regarding the credit under I.R.C. § 30D for qualified plug-in electric drive motor vehicles acquired before January 1, 2010, is provided in *Notice 2009-54, 2009-1 C.B. 1124*. See also *Notice 2009-58, 2009-2 C.B. 163* (relating to the plug-in electric vehicle credit under I.R.C. § 30) to provide that a vehicle is considered "acquired" when title to that vehicle passes under state law. **Notice 2009-89, I.R.B. 2009-48**.

**S CORPORATIONS**

ASSESSMENTS. The taxpayer was a majority shareholder in an S corporation which held an interest in a limited partnership which was sold. The corporation overstated the corporation's basis in the partnership, resulting in an understatement of taxable income from the sale. More than three years and less than six years after the filing of the tax return for the year of the sale, the IRS filed a notice of deficiency which resulted from a reduction of the corporation's basis in the partnership. The corporation sought summary judgment because the assessment was filed more than three years after the filing of the return. The IRS argued that the six year limitation applied because the return understated taxable income. The court held, under *Bakersfield Energy Partners, LP v. Comm'r, 128 T.C. 207, aff'd, 2009-1 U.S. Tax Cas. (CCH) ¶ 50,448 (9th Cir. 2009)*, that the six year limitation did not apply because the overstatement of basis was not an understatement of receipt of income. **UTAM, Ltd. v. Comm'r, T.C. Memo. 2009-253**.

**SELF-EMPLOYMENT INCOME**. The taxpayer was an insurance agent who worked for an insurance company under an agency agreement. The taxpayer terminated the agreement and received funds from the insurance company based on existing policies and the taxpayer's term of employment with the company. The taxpayer claimed that the funds were received in exchange for the agency and were capital gains. The court held that the payment was ordinary income because the taxpayer did not transfer anything to the insurance company, except what was required under the agency agreement. In addition, the court held that the payment was self-employment income because the payment was based on the services provided by the taxpayer. **Lenard v. Comm'r, T.C. Summary Op. 2009-165**.

The taxpayer was employed as a truck driver. The taxpayer entered into an operating agreement with one shipper to haul shipment orders placed by the shipper's customers. The court held that the taxpayer was an independent contractor and the amounts received for making deliveries were self-employment income to the taxpayer, based on the following factors (1) the taxpayer determined which and when deliveries would be made; (2) the taxpayer either leased or owned the truck and paid for maintaining the truck, (3) the taxpayer was paid a fixed percentage of the gross amount billed for each delivery, (4) the employment agreement stated that the taxpayer was to be treated as an independent contractor and the taxpayer did not object to receiving Forms 1099 over several years which claimed all payments as non-wage income, and (5) the taxpayer incurred substantial non-reimbursed expenses in performance of the taxpayer's services. **Byers v. Comm'r, 2009 U.S. App. LEXIS 24721 (8th Cir. 2009), *aff'g*,**

**T.C. Memo. 2007-331**.

**WITHHOLDING TAXES**. The IRS has issued amended rules for determining the amount an employer should withhold from wages paid to nonresident alien employees. The original rules, *Notice 2005-76, 2005-2 C.B. 947*, eliminate the previous requirement that a specified additional amount, based on payroll period, be withheld from each nonresident alien's paycheck. Withholding for a payroll period, however, will be determined by applying the applicable withholding table to the sum of the wages earned during the payroll period and an additional dollar amount specified in the new guidance for the payroll period. The amended rules reflect changes made in the withholding tables as a result of the enactment of I.R.C. § 36A (the "Making Work Pay Tax Credit") in the American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5). Nonresident alien individuals are not eligible for the Making Work Pay Tax Credit under Section 36A. The modified rules provide for withholding on the wages of nonresident alien employees that more closely approximates their income tax liability. **Notice 2009-91, I.R.B. 2009-48**.

**WORK OPPORTUNITY TAX CREDIT**. The taxpayer had claimed the work opportunity tax credit and welfare-to-work tax credit for 3,000 employees in its nursing home business. The taxpayer argued that the employees automatically qualified as members of a qualified group simply on the basis of a request for certification from state agencies. The court held that the credits were properly disallowed for employees for whom certification was not obtained. **Manor Care, Inc. v. United States, 2009-2 U.S. Tax Cas. (CCH) ¶ 50,7725 (Fed. Cls. 2009)**.

# INSURANCE

**COVERAGE.** The plaintiff owned and operated a hog confinement operation in which 223 hogs died. The immediate cause of death was determined to be excessive heat resulting from the failure of a thermostatically-controlled ventilation curtain which failed to open. The thermostat failed because of a rupture of a sensor tube caused by some sort of impact on the tube. The plaintiff had obtained two insurance policies from the two defendant insurance companies. Both policies had coverage exclusion provisions for mechanical failure but covered losses from explosion, smoke and wind damage. The court held that the trial court properly dismissed the breach of contract action against the insurance companies because the loss of the hogs was caused by mechanical failure of the thermostatically-controlled ventilation curtain. The court noted that the report of engineer experts was that the sole cause of death was excessive heat but did not include any explosion, smoke or wind damage to the hogs or equipment. **Farmers Elevator, Inc. v. Hartford Fire Ins. Co., 2009 Neb. App. LEXIS 189 (Neb. Ct. App. 2009)**.

# PROPERTY

**BOUNDARY.** The parties owned adjoining land and the plaintiffs sought the right to remove a pine tree which was located on the boundary line and near the plaintiffs' house. The plaintiffs alleged that the tree posed a threat to the house from falling during a wind storm. The trial court ruled that the plaintiffs could remove the tree so long as they took care to minimize the damage to the defendants' land. The trial court reasoned that, because the plaintiffs had the right to remove all of the tree on their side of the boundary and that removal would cause the death of the tree, the plaintiffs could remove the whole tree. The appellate court reversed, noting that the case was of first impression in Alabama. The appellate court followed the legal principle of *Cathcart v. Malone, 229 S.W.2d 157 (Tenn. Ct. App. 1950)* that a tree located on a boundary belongs to both property owners as tenants in common and requires the permission of both owners for removal. One concurring justice would make an exception where the removing party could prove that the tree constituted a nuisance or danger. **Young v. Ledford, 2009 Ala. Civ. App. LEXIS 554 (Ala. Ct. App. 2009)**.

# ZONING

**SPECIAL USE PERMIT.** The plaintiff was a neighbor of persons who applied for a special use permit in order to operate a horse boarding, stabling and riding stable and to hold two annual horse events on their property. The land was zoned rural residential and the zoning status prohibited "commercial: agriculture-related" activities. The local zoning board approved the permit as a "commercial: agriculture-related" in error. When the error was discovered the board decided to change the approval to a "resource-based recreational use" which was allowed by the zoning law. The court held that the proper characterization of the activities was "commercial: agriculture-related" and the zoning board had to use that characterization in reviewing the permit request; therefore, the approval of the permit under another characterization was improper. **Keene v. Zoning Board of Adjustment, 2009 Fla. App. LEXIS 16130 (Fla. Ct. App. 2009)**.

# IN THE NEWS

**ESTATE TAX LEGISLATION.** A bill has been introduced in the U.S. House of Representatives which would (1) eliminate the estate tax for all farms that are bequeathed to a member of the decedent's family and remain in production. A member of the family is defined to include: (1) a member of the family (as defined by I.R.C. § 2031A(e)(2)), and (2) includes—

(1) a lineal descendant of any spouse described in I.R.C. § 2032A(e)(2)(D),

(2) a lineal descendant of a sibling of a parent of such individual,

(3) a spouse of any lineal descendant described in (2), and

(4) a lineal descendant of a spouses described (3).

The bill also reinstates the family-owned business deduction and allows a deduction of $8 million, indexed to inflation. **H. R. 4015**.

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Contact Robert Achenbach at 541-466-5544, e-mail Robert@agrilawpress.com

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# FARM INCOME TAX, ESTATE AND BUSINESS PLANNING SEMINARS

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- Farm income items and deductions; losses; like-kind exchanges; and taxation of debt including the Chapter 12 bankruptcy tax provisions.
- Deferring crop insurance proceeds and livestock sales; reinvestment opportunities for livestock to avoid reporting the gain; involuntary conversions.
- Circumstances under which self-employment tax is due, including the transfer tax situation (estate, gift and GSTT) for 2010.
- Income tax aspects of property transfer, including income in respect of decedent, installment sales, private annuities, self-canceling installment notes, and part gift/part sale transactions.
- Introduction to estate and business planning.
- Co-ownership of property, including discounts, taxation and special problems.
- Federal estate tax, including alternate valuation date, special use valuation, handling life insurance, marital deduction planning, disclaimers, planning to minimize tax over deaths of both spouses, and generation skipping transfer tax.
- Gifts and federal gift tax, including problems with future interests, handling estate freezes, and "hidden" gifts.
- Organizing the farm business—one entity or two, corporations, general and limited partnerships and limited liability companies; emphasis on entity liquidations, reorganizations and other strategies for removing capital from the entity.
- Recent developments in the treatment of passive losses of LLCs and LLPs
- Recent legislation tax provisions.

The seminar registration fee is $645 for current subscribers to the *Agricultural Law Digest,* the *Agricultural Law Manual* or the *Principles of Agricultural Law*. The registration fee for nonsubscribers is $695. For more information call Robert Achenbach at 541-466-5544 or e-mail at robert@agrilawpress.com.