Agricultural Law Press
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Issue Contents

Agricultural Law Digest

Volume 21, No. 2 January 22, 2010 ISSN 1051-2780

Traps in Abandonment of Property in Bankruptcy

-by Neil E. Harl*

The economic downturn since 2007 and the rising tide of bankruptcies have focused attention on the consequences of abandonment in bankruptcy.[1] While bankruptcy law in the United States (in contrast to the treatment in some other countries) has long assured individual debtors a "fresh start" in life following bankruptcy,[2] with such debtors in liquidation bankruptcy (Chapter 7)[3] as well as reorganization bankruptcy[4] generally eligible for discharge of debt, the way abandonments in bankruptcy are handled under prevailing case law[5] interferes substantially with the vaunted fresh start after bankruptcy.[6] A 1989 letter ruling issued by the Internal Revenue Service[7] on the handling of abandoned assets which are subjected to foreclosure or other creditor action in the hands of the debtor contributes to the burdens of a debtor and further interferes with the debtor's fresh start.

What is abandonment?

If property of the bankruptcy estate is burdensome to the estate or of inconsequential value to the estate (which usually means the property is worth less than what is owed on it), the property may be abandoned by the bankruptcy trustee or the court may order the trustee to abandon the property on request of a party in interest, after notice and a hearing.[8] A trustee may abandon property of the bankruptcy estate without obtaining a court order authorizing abandonment when there is no objection to the proposed abandonment by an interested party.[9] Abandonment of the property causes the property to be transferred to the debtor in what has been termed a "deflection" of the property from the bankruptcy estate.[10]

Usually, following abandonment of property, the way is cleared for the creditors to seek foreclosure or to take other measures to have the value of the property applied on the debt owing by the debtor.

The income tax consequences

The movement of the property of the debtor into the bankruptcy estate upon filing does not trigger adverse income tax consequences to the debtor.[11] Similarly, the movement of the property from the bankruptcy estate back to the debtor *at the termination* of the bankruptcy estate is not treated as a disposition of the property.[12] However, the bankruptcy income tax rules say nothing about the tax consequences of abandonments or transfers to third parties (such as where property is abandoned to the creditor).[13]

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Agricultural Law Digest is published by the Agricultural Law Press, P.O. Box 835, Brownsville, OR 97327 (ph 541-466-5544), bimonthly except June and December. Annual subscription $120 ($90 by e-mail). Copyright 2010 by Robert P. Achenbach, Jr. and Neil E. Harl. No part of this newsletter may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, recording or by any information storage or retrieval system, without prior permission in writing from the publisher. http://www.agrilawpress.com Printed on recycled paper.

If an abandonment is properly characterized as involving a completed transfer to the bankruptcy estate followed by a transfer of the property back to the debtor by abandonment, arguably the retransfer to the debtor would trigger income tax liability, in which case the tax liability would be trapped in the bankruptcy estate (the "entrapment" theory). However, if the abandonment is properly characterized as a "deflection" of the property from the bankruptcy estate,[14] the tax liability when the property is lost to the creditors would rest with the debtor. Indeed, the so-called "deflection" theory has been upheld by the Eighth[15] and Ninth[16] Circuit Courts of Appeal. The deflection theory has been embraced by Bankruptcy Courts in Massachusetts[17] and Maryland.[18] in addition to litigated decisions in Minnesota[19] and Nebraska[20] where the Eighth Circuit decisions prevail.

In the Eighth and Ninth Circuit Court of Appeals areas in particular, this assures that any gain on the abandoned property will be taxed to the debtor.

The 1989 IRS letter ruling

In a 1989 private letter ruling,[21] real property of a debtor had been abandoned to the debtor. The unsecured portion of the mortgage (involving a recourse loan) was discharged in bankruptcy. The mortgage, however, survived the bankruptcy. IRS ruled that the taxpayer had to reduce income tax attributes[22] including reduction of income tax basis of the mortgaged property.[23] IRS further ruled that the taxpayer would realize upon foreclosure of the mortgage the entire remaining secured portion of the mortgage as proceeds *of a non-recourse loan* (the personal liability of the taxpayer having been discharged in bankruptcy) and recognize gain to the extent the remaining debt exceeded the taxpayer's basis in the property after reduction for the discharge of indebtedness in bankruptcy.

Thus, not only was the gain on the property taxed to the debtor because of abandonment but the entire difference between the reduced basis and the amount of the debt was income to the debtor. As noted in a recent *Digest* article,[24] the outcome would have been more favorable under the 2005 Bankruptcy Act amendments[25] (pertaining to Chapter 12 Bankruptcy) as interpreted by the Eighth Circuit Court of Appeals in *Knudsen v. Internal Revenue Service*.[26]

ENDNOTES

1 11 U.S.C. § 554. See generally 5 Harl, *Agricultural Law* §§ 39.04[2][a][iv], 120.04[3] (2009); 2 Harl, *Farm Income Tax Manual* § 9.05[6][b] (2010 ed.).

2 Brown v. Felsen, 442 U.S. 127, 128 (1979).

3 11 U.S.C. § 727(a)(1).

4 11 U.S.C. §§ 1141(d) (Chapter 11), 1228(a) (Chapter 12), 1328(a) (Chapter 13).

5 E.g., Matter of Bentley, 916 F.2d 431 (8th Cir. 1990), *aff'g*, 89-2 U.S.Tax Cas. ¶ 9597 (S.D. Iowa 1988), *rev'g*, 79 B.R. 413 (Bankr. S.D. Iowa 1987). But see *In re* A.J. Lane & Co., 133 B.R. 264 (Bankr. D. Mass. 1991).

6 For a critical review of the obvious inequity of the prevailing view of the taxation of abandoned assets, see 5 Harl, *Agricultural Law* § 39.04[2][a][v] (2009).

7 Ltr. Rul. 8918016, January 31, 1989.

8 11 U.S.C. § 554(a), (b). See, *e.g., In re* Johnston, 49 F.3d 538 (9th Cir. 1995) (requirements for abandonment did not include consideration of income tax effects on debtor); *In re* Olson, 930 F.2d 6 (8th Cir. 1991).

9 In re Trim-x, 695 F.2d 296 (7th Cir. 1982).

10 5 Harl, *Agricultural Law* § 39.04[2][a][iv] (2009).

11 I.R.C. § 1398(f)(1).

12 I.R.C. § 1398(f)(2).

13 See *In re* Butler, 51 B.R. 261 (Bankr. D. D.C. 1984). But see Matter of Popp, 166 B.R. 697 (Bankr. D. Neb. 1993) (court denied abandonment to creditor requested by debtor because of debtor's potential income tax liability on farm machinery; bankruptcy court stated that there would be no income tax consequences to debtor under I.R.C. § 1398(f)(2)).

14 See, *e.g. In re* Cruseturner, 8 B.R. 581, 591 (Bankr. D. Utah 1981):

> "[W]hen the trustee abandons property, the property stands as if no bankruptcy had been filed and the debtor enjoys the same claim to it and interest in it as he held previous to the filing of bankruptcy."

15 In Matter of Bentley, 916 F.2d 431 (8th Cir. 1990); *In re* Olson, 930 F.2d 6 (8th Cir. 1991).

16 *In re* Johnston, 49 F.3d 538 (9th Cir. 1995).

17 *In re* A.J. Lane & Co., Inc., 133 B.R. 264 (Bankr. D. Mass. 1991).

18 *In re* Rubin, 154 B.R. 897 (Bankr. D. Md. 1992).

19 *In re* Laymon, 1989 U.S. Dist. LEXIS 17345 (D. Minn. 1989).

20 *In re* Nebel, 175 B.R. 306 (Bankr. D. Neb. 1994).

21 Ltr. Rul. 8918016, January 31, 1989.

22 I.R.C. § 108.

23 I.R.C. § 108((b)(2)(E)(I).

24 Harl and Peiffer, "Major Development in Income Taxation of Chapter 12 Bankruptcy Debtors," 20 *Agric. L. Dig.* 145, 146 (2009).

25 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005), enacting 11 U.S.C. § 1222(a)(2).

26 581 F.3d 696 (8th Cir. 2009).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

FEDERAL TAX

REFUND. The debtors were a corporation and its affiliates who filed for Chapter 11 in December 2008. On the debtors consolidated tax returns for 2009, the debtors claimed a $119 million net operating loss which was carried back to 2007 and 2008, resulting in a refund claim for taxes paid in those years. The IRS filed to offset $17 million of the refund against pre-petition excise and employment taxes and penalties. The debtors argued that the refund was not a pre-petition debt eligible for the offset because the right to the refund did not exist until the last day of the 2009 tax year, January 31, 2009, which occurred after the filing of the petition. The court noted the holding in *Segal v. Rochelle, 382 U.S. 375 (1966)*, in which the Supreme Court held that a claim for an NOL carryback tax refund was property of the estate because it was "sufficiently rooted in the pre-bankruptcy past." The court held that, to the extent the refund claim was based on NOL carrybacks to pre-petition tax years, the refund claim was pre-petition property. No ruling was made as to the 2009 NOL, although the discussion indicates that the 2009 NOL would be post-petition property. ***In re* Flying J, Inc., 2010-1 U.S. Tax Cas. (CCH) ¶ 50,155 (Bankr. D. Del. 2009)**.

FEDERAL FARM PROGRAMS

GENETICALLY MODIFIED ORGANISMS. The APHIS has announced that it has prepared a draft environmental impact statement in connection with making a determination on the status of the Monsanto Company and Forage Genetics International alfalfa lines, known as Roundup Ready Alfalfa and designated as events J101 and J163 as regulated articles. **75 Fed. Reg. 1585 (Jan. 12, 2010)**.

ORGANIC FOOD. The AMS has adopted as final regulations amending the USDA National List of Allowed and Prohibited Substances regulations to reflect recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board on November 19, 2008 and May 6, 2009, adding one substance, sulfurous acid, and amending the listing for tetracycline. **75 Fed. Reg. 1555 (Jan. 12, 2010)**.

FEDERAL ESTATE AND GIFT TAXATION

ALTERNATE VALUATION DATE. The decedent's executor timely filed Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return and the executor hired a CPA to prepare Form 706. The CPA did not make the alternate valuation election under § 2032 on the Form 706. After appraisals on estate property were obtained, the CPA prepared a supplemental Form 706 and within one year of the due date of the return, including extensions, the executor filed the supplemental Form 706 making that election. The IRS granted the estate an extension of time to make the alternate valuation election. **Ltr. Rul. 201001014, Sept. 23, 2009**.

DISCLAIMERS. The taxpayer was the grandchild of the grantor of a pre-1977 trust (before enactment of federal rules on disclaimers in 1976). The taxpayer was entitled to receive discretionary distributions and did receive some distributions prior to reaching age 18. The taxpayer was also entitled to receive a portion of the trust corpus if the taxpayer was alive when the trust terminates. Within nine months after reaching age 18, the taxpayer executed a written disclaimer of the taxpayer's contingent right to the termination distribution. The IRS ruled that the disclaimer was effective and did not result in a transfer subject to gift tax. **Ltr. Rul. 200953010, Sept, 14, 2009 (looked to applicable state law); Ltr. Rul. 200953013, Sept, 14, 2009 (same); Ltr. Rul. 201001007, Sept. 14, 2009 (same)**.

GIFTS. The taxpayers, husband and wife, sold a company and formed a limited partnership to hold the proceeds of the sale, first as stock then as money invested in other companies. The partnership had a wholly-owned corporation as general partner owning 1 percent of the partnership, with the taxpayers each owning 49.5 percent limited partnership interests. The taxpayers gifted limited partnership interests to their children over three years and filed gift tax returns which applied the annual exclusion to the gifts. The IRS disallowed the use of the exclusions, arguing that the taxpayers transferred only future interests. The court found that the partnership agreement (1) prevented partners from selling, assigning or transferring their partnership interests without the consent of all partners, (2) prevented the partners from withdrawing capital accounts, and (3) gave the donees only a right to share in income. The court held that these restrictions transferred less than a present interest in the partnership and disqualified the transfers for the annual gift tax exclusion. In addition, the court noted that the partnership agreement could be interpreted to exclude the donees as partners because assignment of partnership interests to persons who were not already partners did not make the assignees partners. The court noted that the children were not initially partners when the partnership was formed; therefore, the gifts of partnership interests did not make the children partners. **Price v. Comm'r, T.C. Memo. 2010-2**.

FEDERAL INCOME TAXATION

ACCOUNTING METHOD. The taxpayer timely e-filed (with extensions) its federal income tax return for the year of change, along with the original Form 3115 filed under *Rev. Proc. 2002-9, 2009-2 C.B. 327 (*which has been superseded by *Rev. Proc. 2008-52, 2008-2 C.B. 587*, which in turn has been amplified, clarified and modified by *Rev. Proc. 2009-39, 2009-2 C.B. 371)* to change its method of accounting for prepaid expenses. However, the taxpayer inadvertently failed to file with the IRS national office a signed duplicate copy of the Form 3115 on or before the date the original Form 3115 was filed with its tax return, as required by section 6.02(3)(a) of *Rev. Proc. 2002-9*. This oversight was due in part to several personnel changes within the taxpayer's finance department, including a new tax manager, which led to the taxpayer's confusion regarding filing requirements and responsibilities. The IRS granted the taxpayer a 30-day extension to file the From 3115 with the national office. **Ltr. Rul. 200953009, Sept. 29, 2009**.

CHARITABLE DEDUCTIONS. The taxpayers, three related married couples, donated interests in a family limited partnership to a charity. The court held that a charitable contribution deduction was properly denied because the taxpayer failed to obtain a contemporaneous written acknowledgement from the charitable donee and provide a qualified appraisal of the value of the donated property. The appellate court affirmed in a decision designated as not for publication. **Smith v. Comm'r, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,144 (9th Cir. 2009), *aff'g*, T.C. Memo. 2007-368**.

CHILDREN. The IRS has issued a list of the 10 issues taxpayers should consider if they have children:

Dependents. In most cases, a child can be claimed as a dependent in the year they were born. For more information see IRS Publication 501, Exemptions, Standard Deduction, and Filing Information.

Child Tax Credit. Taxpayers may be able to take this credit on your tax return for each of your children under age 17. If taxpayers do not benefit from the full amount of the Child Tax Credit, taxpayers may be eligible for the Additional Child Tax Credit. The Additional Child Tax Credit is a refundable credit and may give taxpayers a refund even if they do not owe any tax. For more information see IRS Publication 972, Child Tax Credit.

Child and Dependent Care Credit. Taxpayers may be able to claim the credit if they pay someone to care for their child under age 13 so that they can work or look for work. For more information see IRS Publication 503, Child and Dependent Care Expenses.

Earned Income Tax Credit. The EITC is a benefit for certain people who work and have earned income from wages, self-employment or farming. EITC reduces the amount of tax taxpayers owe and may also result in a refund. For more information see IRS Publication 596, Earned Income Credit.

Adoption Credit. Taxpayers may be able to take a tax credit for qualifying expenses paid to adopt an eligible child. For more information see the instructions for IRS Form 8839, Qualified Adoption Expenses.

Children with Earned Income. If children have income earned from working they may be required to file a tax return. For more information see IRS Publication 501.

Children with Investment Income. Under certain circumstances a child's investment income may be taxed at the parent's tax rate. For more information see IRS Publication 929, Tax Rules for Children and Dependents.

Coverdell Education Savings Account. This savings account is used to pay qualified educational expenses at an eligible educational institution. Contributions are not deductible, however, qualified distributions generally are tax-free. For more information see IRS Publication 970, Tax Benefits for Education.

Higher Education Credits. Education tax credits can help offset the costs of education. The American Opportunity and the Lifetime Learning Credit are education credits that reduce the federal income tax dollar-for-dollar, unlike a deduction, which reduces only taxable income. For more information see IRS Publication 970.

Student Loan Interest. Taxpayers may be able to deduct interest a taxpayer pays on a qualified student loan. The deduction is claimed as an adjustment to income so there is no need to itemize deductions. For more information see IRS Publication 970.

CORPORATIONS

CONSTRUCTIVE DIVIDENDS. The taxpayer was the sole owner of a C corporation which operated a dry cleaning business and which filed Form 1120, U.S. Corporation Income Tax Return for the year at issue. The evidence showed that the corporation made payments on the taxpayer's personal credit card accounts, made payments to the taxpayer which were not reported as wages, paid premiums on personal insurance policies on the taxpayer and paid rent to the taxpayer for a transaction not listed on the corporation profit and loss statement. The court held that the corporation's payments of personal expenses were constructive dividends to the taxpayer. **Rosser v. Comm'r, T.C. Memo. 2010-6**.

COURT AWARDS AND SETTLEMENTS. The taxpayer suffered from multiple sclerosis (MS) when hired by an employer. The taxpayer had disagreements with the taxpayer's supervisor which the taxpayer claimed aggravated the MS condition such that the taxpayer's doctor ordered a two week suspension of work. After the taxpayer was fired, the taxpayer hired an attorney to seek compensation for the improper termination. A settlement was reached and the employer paid three separate amounts of money: (1) funds listed as back wages, which were included in the taxpayer's wage income; (2) funds paid directly to the taxpayer's attorney, for which no Form 1099 was filed; and (3) funds paid to the taxpayer, for which a Form 1099-MISC was filed without any withholding of taxes. Although the settlement agreement was silent or at least ambiguous as to the purpose of the third payment, the court found that the division of the payments indicated that the intent of the third payment was compensation for the physical injuries suffered by the taxpayer from the stress of the work and termination. The court held, therefore, that the third payment was properly excluded from income. **Domeny v. Comm'r, T.C. Memo. 2010-9**.

The taxpayer had a disagreement with a supervisor and began taking extended leaves because of stress from the disagreement. When the leave was exhausted, the taxpayer's employment was terminated. The taxpayer filed a gender discrimination and retaliation suit against the employer for wrongful termination. The suit sought damages for the emotional distress caused by the disagreement. The parties reached a settlement and the taxpayer received a cash payment and Form 1099-MISC listing the payment. The taxpayer excluded the payment from taxable income, arguing that the payment was compensation for the emotional distress as stated in the settlement agreement. The court held that the payment was taxable income because the payment was not made in compensation for physical injuries or illness. **Wells v. Comm'r, T.C. Memo. 2010-5**.

DISASTER LOSSES. On December 22, 2009, the President determined that certain areas in Alabama are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of tropical storm Ida, which began on November 9, 2009. **FEMA-1866-DR.** On December 22, 2009, the President determined that certain areas in New Jersey are eligible for assistance from the government under the Act as a result of tropical depression Ida, which began on November 11, 2009. **FEMA-1867-DR.** Accordingly, taxpayers in the areas may deduct the losses on their 2008 federal income tax returns. See I.R.C. § 165(i).

DISCHARGE OF INDEBTEDNESS. The taxpayers used a credit card to pay hospital bills and cash advances, acquiring a balance of $21,270. The taxpayers and credit card company reached an agreement under which the credit card company agreed to settle the account for $4,592. The credit card company issued a Form 1099-C listing the difference as discharge of indebtedness income. The taxpayers did not include this amount in taxable income. The taxpayers argued that the amount forgiven was all accrued interest; therefore, the settlement represented a purchase price adjustment in that the credit card company essentially agreed to less interest charge. The court held that the purchase price adjustment exception of I.R.C. § 108(e)(5) did not apply because the taxpayers did not buy any property from the credit card company. The appellate court affirmed in a decision designated as not for publication. Note that it is well established that cancellation of accrued interest (unless deducted by a taxpayer on accrual accounting) is of no income tax consequence if the receipt of interest income can be offset by a deduction of interest expense. **Payne v. Comm'r, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,132 (8th Cir. 2009), *aff'g*, T.C. Memo. 2008-66**.

The taxpayer was a limited liability company which owned interests in other LLCs which were treated as disregarded entities for federal tax purposes. One LLC owned real property. The taxpayer borrowed money and the loan was secured by the taxpayer's interest in the disregarded LLC which owned real property. The loan was later re-negotiated to forgive a portion of the loan and the taxpayer sought a ruling that the discharged indebtedness was qualified real property business indebtedness under I.R.C. § 108(a)(1)(D). The IRS ruled that the loan was secured by an interest in real property because the LLC was disregarded for income tax purposes. **Ltr. Rul. 200953005, Sept. 23, 2009**.

EMPLOYEE BENEFITS. The IRS has issued a revenue procedure which provides that: (1) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2010 for which the vehicle cents-per-mile valuation rule provided under Treas. Reg. § 1.61-21(e) may be applicable is $15,300 for a passenger automobile and $16,000 for a truck or van; and (2) the maximum value of employer-provided vehicles first made available to employees for personal use in calendar year 2010 for which the fleet-average valuation rule provided under Treas. Reg. § 1.61-21(d) may be applicable is $20,300 for a passenger automobile and $21,000 for a truck or van. **Rev. Proc. 2010-10, 2010-1 C.B. 300**.

FORMS. The IRS has issued interim rules doubling the period for submission to the IRS (or an agent or contractor of the IRS) of taxpayer requests for, and consents to disclosure of, returns and return information under I.R.C. § 6103(c). **Notice 2010-08, I.R.B. 2010-3. See also IR-2009-122**.

HOBBY LOSSES. The taxpayers, two related married couples, were denied claimed business expenses for horse-raising and dog breeding activities. The court held that the activities were not entered into with the intent to make a profit because (1) they failed to keep proper records regarding their business activities and the purchase, sale, or breeding of the respective animals sufficient to analyze and improve the profitability of the activities; (2) they failed to keep separate bank accounts; and (3) they each reported continuous and increasing losses from the activities. The appellate court affirmed in a decision designated as not for publication. **Smith v. Comm'r, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,144 (9th Cir. 2009), *aff'g*, T.C. Memo. 2007-368**.

HOMEBUYER CREDIT. The IRS has published Form 5405, First-Time Homebuyer Credit and Repayment of the Credit, and instructions, available on the IRS web site www.irs.gov/pub/irs-pdf/f5405.pdf. In addition to filling out a Form 5405, all eligible homebuyers must include with their 2009 tax returns one of the following documents in order to receive the credit: (1) A copy of the settlement statement showing all parties' names and signatures, property address, sales price, and date of purchase. Normally, this is the properly executed Form HUD-1, Settlement Statement. (2) For mobile home purchasers who are unable to get a settlement statement, a copy of the executed retail sales contract showing all parties' names and signatures, property address, purchase price and date of purchase. (3) For a newly constructed home where a settlement statement is not available, a copy of the certificate of occupancy showing the owner's name, property address and date of the certificate. The IRS has stepped up compliance checks involving the homebuyer credit and encourages homebuyers claiming the $6,500 credit for individuals who have owned and used the same residence as their principal residence for any five consecutive year period during the eight year period ending on the date of purchase of a subsequent principal residence to avoid delays by attaching documentation covering the five-consecutive-year period: (1) Form 1098, Mortgage Interest Statement, or substitute mortgage interest statements, (2) property tax records or (3) homeowner's insurance records. The IRS also reminded homebuyers that the new documentation requirements mean that taxpayers claiming the credit cannot file electronically and must file paper returns. Taxpayers can still use IRS Free File to prepare their returns, but the returns must be printed out and sent to the IRS, along with all required documentation. Normally, it takes about four to eight weeks to get a refund claimed on a complete and accurate paper return where all required documents are attached. For those homebuyers filing early, the IRS expects the first refunds based on the homebuyer credit will be issued toward the end of March. **IR-2010-6.**

LEGAL FEES. The taxpayer was convicted of embezzlement and falsification of records. The embezzlement was committed by the taxpayer as part of a scheme to obtain funds from the taxpayer's employer. The falsification of records occurred under the supervision of the employer and benefitted the employer. The court held that the legal fees incurred to defend against the embezzlement charges were not deductible business expenses because the taxpayer's action did not arise out of employment. The court also held that the legal fees incurred to defend against the falsification of records charge was a deductible business expense because the taxpayer's action were made as part of employment and benefitted the employer. **Gordon v. United States, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,142 (S.D. NY. 2009)**.

LETTER RULINGS. The IRS has issued its annual list of procedures for issuing letter rulings. Appendix A contains a schedule of user fees. **Rev. Proc. 2010-1, 2010-1 C.B. 1**.

The IRS has issued its annual list of procedures for furnishing technical advice to District Directors and Chiefs, Appeals Offices. **Rev. Proc. 2010-2, 2010-1 C.B. 90**.

The IRS has issued its annual list of tax issues for which the IRS will not give advance rulings or determination letters. **Rev. Proc. 2010-3, 2010-1 C.B. 110**.

The IRS has issued its annual list of procedures for issuing letter rulings involving exempt organizations. **Rev. Proc. 2010-4, 2010-1 C.B. 122**.

The IRS has issued its annual list of procedures for furnishing of technical advice memoranda to an Employee Plans Examinations Area manager, an Exempt Organizations Examinations Area manager, an Employee Plans Determinations manager, an Exempt Organizations Determinations manager or an Appeals Area director regarding issues in the employee plans areas (including actuarial matters) and the exempt organizations areas. **Rev. Proc. 2010-5, 2010-1 C.B. 165.**

The IRS has issued procedures for issuing determination letters on qualified status of employee plans under I.R.C. §§ 401(a), 403(a), 409 and 4975. **Rev. Proc. 2010-6, 2010-1 C.B. 193.**

The IRS has issued a revenue procedure which provides guidance for complying with the user fee program of the Internal Revenue Service as it pertains to requests for letter rulings, determination letters, etc., on matters under the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division; and requests for administrative scrutiny determinations under *Rev. Proc. 93-41, 1993-2 C.B. 536*. **Rev. Proc. 2010-8, 2010-1 C.B. 234**.

MEDICAL EXPENSES. The taxpayer fathered two children using an 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, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150 (1st Cir. 2009), *aff'g*, T.C. Memo. 2008-293**.

NET OPERATING LOSSES. The taxpayers, husband and wife, operated a dentistry business. The wife handled the bookkeeping and filing of insurance claims. The wife was convicted of mail fraud in the filing of false insurance claims. The funds collected under the false claims was included in taxable income by the business. Under the contract with the insurance company, if any insurance claims were denied, the taxpayers were required to repay the disallowed claims that had been paid. The wife's criminal conviction included a provision that a civil restitution agreement was to be fulfilled but the criminal conviction did not otherwise order restitution. The IRS argued that payments made under the civil restitution agreement were deductible, under I.R.C. § 165(c)(2) only to the extent of business income in a tax year, thus eliminating any deduction for carryback of net operating losses created by the restitution payments. Although the court recognized that a deduction for restitution for criminal acts is generally restricted by Section 165(c)(2), the taxpayers in this case were not required to pay restitution for the criminal acts but were required by their contract with the insurance company to repay the disallowed claims that were falsely submitted. Therefore, the court held that the payment of the restitution was deductible under I.R.C. § 162 as a business expense and eligible for net operating loss carryback treatment. **Cavaretta v. Comm'r, T.C. Memo. 2010-4**.

PASSIVE ACTIVITY LOSSES. The IRS has issued rules that require taxpayers to report, for purposes of the passive activity loss rules under I.R.C. § 469 and Treas. Reg. § 1.469-4, their groupings and regroupings of activities, as well as the addition of specific activities within the current grouping of activities. Special disclosure rules apply to partnerships and S corporations.

The failure to report whether activities have been grouped as a single activity will generally result in the unreported activities being treated as separate activities under a default rule. The rules are effective for all tax years beginning on or after January 25, 2010. The requirements reflect comments received in response to a proposed disclosure regime for taxpayer groupings issued by the IRS in *Notice 2008-64, 2008-2 C.B. 268*. **Rev. Proc. 2010-13, I.R.B. 2010-4**.

PENSION PLANS. For plans beginning in January 2010 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 4.49 percent, the corporate bond weighted average is 6.42 percent, and the 90 percent to 100 percent permissible range is 5.77 percent to 6.42 percent. **Notice 2010-14, I.R.B. 2010-5**.

RETURNS. Generally, Treas. Reg. §§ 301.6011-5, 301.6033-4, and 301.6037-2 require C corporations, S corporations, and tax-exempt organizations with $10 million or more in assets and required to file at least 250 returns during the calendar year to electronically file their income tax or annual information returns. However, the regulations provide for exceptions and hardship waivers of the electronic filing requirement. A taxpayer that fails to file electronically as required will be liable for penalties unless it can establish that the failure was due to reasonable cause and not due to willful neglect. The IRS may waive the electronic filing requirement if the taxpayer demonstrates that it would suffer undue hardship. A taxpayer seeking a waiver for undue hardship must specifically seek the waiver by submitting a request as prescribed by the IRS. The IRS has updated the procedures that C corporations, S corporations, and certain tax-exempt organizations must use to request a waiver of the requirement to electronically file Form 1120, Form 1120S, Form 990 and Form 990-PF. The guidance also reduces the perfection period for rejected e-filed returns from 20 days to 10 days. The guidance is effective for all returns, including amended and superseding returns, filed after December 31, 2009. **Notice 2010-13, I.R.B. 2010-4**.

The IRS has announced that, effective January 15, 2010, most taxpayers can have free use of helpful tax preparation software and free electronic filing of the federal tax returns. The service is free for taxpayers with adjusted gross income of $57,000 or less. Taxpayers must go through www.IRS.gov homepage or www.IRS.gov/freefile to access the free options. **IR-2010-005**.

S CORPORATIONS

COMPLIANCE WITH TAX LAW. The GAO has issued a report that claims there is substantial noncompliance among S corporations as to reporting of income, claiming of shareholder and corporate basis, underpaying of compensation to employee-shareholders and reporting of excess losses. **GAO Report: Actions Needed to Address Noncompliance with S Corporation Tax Rules (GAO-10-195)**.

SELF-EMPLOYMENT INCOME. The taxpayer was employed as a boat's captain on a fishing boat. The proceeds from the boat's catch on a voyage were divided as follows: (1) The boat's expenses for fuel, ice, and lubricating oil were subtracted from the gross proceeds from the sale of the catch to determine the net proceeds from the voyage; (2) the crew members, including the captain, were allocated 50 percent of the net proceeds (the crew members' share); (3) the boat owner and the captain were allocated 50 percent of the net proceeds (the boat share); (4) the crew members' share was allocated among the crew members, including the captain, after subtracting the crew's expenses for food, payments to laborers employed to help unload the catch, and other miscellaneous items. In addition, before the proceeds were allocated between the crew members' and the boat shares, 1 percent of the gross proceeds from the sale of the catch was paid to trade associations that performed lobbying services for the fishing industry. The taxpayer also received payments for work on the boat's engine. The taxpayer reported the amounts paid on the federal income tax return as income from "commercial fishing not reported on W-2." No self-employment tax was reported or paid. The court held that, under I.R.C. § 3121(b)(20), the taxpayer's share of the fishing proceeds and payments for repair services were self-employment income. **Anderson v. Comm'r, T.C. Memo. 2010-1**.

SOCIAL BENEFIT PROGRAM PAYMENTS. Political subdivisions of a state had responsibility for regulating the provision of safe, decent, and sanitary housing accommodations to residents of low and moderate income levels. The subdivisions established two programs: (1) for-sale and rental affordable housing accommodations were made available to low and moderate income level individuals and (2) to provide safe, decent and affordable short-term rental housing of modest standards to low and moderate income individuals who were enrolled in an employer-sponsored training program. The IRS ruled that the value of the housing benefits received by the recipients under these programs was not compensation and was excludible from gross income under the general welfare exclusion. **Ltr. Rul. 201001013, Oct. 1, 2009**.

TAX-EXEMPT ORGANIZATIONS. The IRS has updated procedures regarding the request, issuance and appeal of determination letters and rulings on the exempt status of organizations under I.R.C. §§ 501 and 521. These procedures apply to exempt organizations other than those relating to pension, profit-sharing, stock bonus, annuity and employee stock ownership plans and are effective as of January 11, 2010. **Rev. Proc. 2010-9, 2010-1 C.B. 258**.

TAX RETURN PREPARERS. The IRS has adopted as final regulations that provide rules relating to the disclosure and use of tax return information by tax return preparers. The regulations provide updated guidance affecting tax return preparers regarding the use of information related to lists for solicitation of tax return business; the disclosure or use of statistical compilations of data under I.R.C. § 7216 by a tax return preparer in connection with, or in support of, a tax return preparer's tax return preparation business, including identification of additional limited circumstances when a tax return preparer who compiles statistical information may disclose the compilation without taxpayer consent, the placement of additional restrictions on the content of the compilation that may be disclosed under those circumstances without taxpayer consent, and the disclosure or use of information for the purpose of performing conflict reviews. **75 Fed. Reg. 48 (Jan. 4, 2010)**.

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