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Issue Contents

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Implications of Death of a Farmer for CCC Loan Purposes

-by Neil E. Harl*

The announcement in 2002[1] that elections involving Commodity Credit Corporation[2] loans were retroactively made subject to the automatic consent procedures (with the list of situations where the automatic consent procedure is not applicable waived),[3] has opened up new options for handling the death of a taxpayer.[4] One of the important aspects involves the issue of income tax basis for commodities that are subject to a CCC election to treat CCC loans as income with that election in effect at the time of death, whether that election is likely to produce the best possible result for the taxpayer and whether it is possible to make a new election effective for the year of death.

Elections available to taxpayers

For many years, taxpayers treated Commodity Credit Corporation loans as loans *unless the taxpayer had made the election to treat the amount of the commodity involved as income*.[5] Thus, a taxpayer who had not made the election to treat CCC loans as income had no income until the commodity serving as collateral for the loan was sold or forfeited to CCC as payment for the loan.[6]

A taxpayer could elect to report CCC loans as income in the taxable year in which the loan was received.[7] Under the regulations, application for permission to change had to be filed within 90 days after the beginning of the taxable year covered by the return[8] although that requirement was eliminated in 2005.[9] However, any further change, including electing to return to treating CCC loans as loans, was a change of accounting method requiring IRS approval.

Effective for taxable years ending on or after December 31, 2001, IRS has ruled that a taxpayer reporting CCC loans as income can switch automatically to treating CCC loans as loans.[10] To take advantage of the automatic consent to treat CCC loans as loans after electing to treat CCC loans as income, a taxpayer must file a Form 3115, *Application for Change in Accounting Method*. Since the change has automatic consent, *Form 3115 may be filed with the return for the year of change*.[11]

Plight of a decedent's estate

If a decedent dies during a year when the election is in effect to treat CCC loans as income, the outcome would likely be that the commodity subject to the election would be deemed as an item of income in respect of decedent, at least up to the amount of the CCC loan[12] because the election might be considered a pre-death "sale" of the commodity. Assets sold

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before death are generally considered subject to IRD treatment with the sale completed by the personal representative of the decedent[13] unless there are "substantive" acts yet to be performed at death.[14] In most instances, this outcome would be decidedly less favorable for the estate than a new income tax basis at death.

However, that result also depends upon whether the stored or growing crop, with or without a CCC loan, would be considered income-in-respect-of decedent. If that were the case, the issue of the CCC loan election is far less important. If the decedent had been a non-materially participating landowner at the time of death, the stored or growing crops would be considered IRD in any event.[15] However, if the decedent had been a materially-participating landowner or a farm operator, stored or growing crops should be eligible for a new income tax basis at death[16] in which case the status of any CCC loan becomes highly relevant.

If the estate wishes to change from reporting CCC loans as income to treating CCC loans as loans, which could well be a more favorable outcome, the question is whether the estate (1) is eligible to file an election to treat CCC loans as loans and, (2) if the estate is eligible, who can sign the Form 3115. As to the first question, the published guidance refers to instances where the taxpayer has ceased to engage in a trade or business[17] and, while referring to five situations where such a cessation occurred,[18] does not list death of the taxpayer although the list is referred to as a "non-exclusive" list.[19] As for the second question, who can sign the Form 3115, the instructions for the form state, for estates and trusts, "enter the name of the estate or trust on the first line of Form 3115. In the signature section of Form 3115, enter the signature of the fiduciary, personal representative, executor, administrator, etc. having legal authority to sign and that person's name and official title below the signature."

A final note

The decisions by an estate in handling CCC loans, as discussed above, depend also upon whether a system of carryover basis applies[20] or a system of a new income tax basis at death is applicable.[21]

ENDNOTES

[1] Rev. Proc. 2002-9, 2001-1 C.B. 327, App. § 1.01 (for the year of change, all loans reported as loans).

[2] See 9 Harl, *Agricultural Law* Ch. 90 (2009).

[3] Rev. Proc. 2008-52, § 4.02, 2008-2 C.B. 587, amplified, clarified and modified by Rev. Proc. 2009-39, 2009-2 C.B. 371.

[4] I.R.C. § 77(a). See generally 4 Harl, *Agricultural Law* § 27.03[5] (2009); Harl, *Agricultural Law Manual* § 4.02[2] (2009); 1 Harl, *Farm Income Tax Manual* § 2.09[4] (2010 ed.). See also Harl, "Changing CCC Loan Reporting," 13 *Agric. L. Dig.* 33 (2002).

[5] I.R.C. § 77(a).

[6] Rev. Rul. 60-211, 1960-1 C.B. 35. See DeHaven v. Comm'r, 36 T.C. 935 (1961).

[7] I.R.C. § 77(a).

[8] Treas. Reg. § 1.77-1.

[9] Rev. Proc. 2005-63, 2005-2 C.B. 491 (procedure removed 90-day requirement for submitting accounting method change request).

[10] Rev. Proc. 2002-9, App. § 1.01, 2002-1 C.B. 327 (for the year of change, all loans to be reported as loans), superseded by Rev. Proc. 2008-52, 2008-2 C.B. 587, amplified, clarified and modified by Rev. Proc. 2009-39, 2009-1 C.B. 371 (procedure for obtaining automatic consent to change method of accounting). See also Ann. 2008-84, 2008-2 C.B. 748 (modifications to Rev. Proc. 2008-52, *supra*, on automatic consent to change method of accounting).

[11] Note that there is no user fee. See note 10 *supra*.

[12] I.R.C. § 691(a).

[13] Rev. Rul. 78-32, 1978-1 C.B. 198. See Estate of Napolitano v. Comm'r, T.C. Memo. 1992-316.

[14] Estate of Peterson v. Comm'r, 74 T.C. 630 (1980), *aff'd*, 667 F.2d 675 (8th Cir. 1981) (calves were too light at the time of death to meet the terms of the pre-death contract; calves did not produce income-in-respect-of-decedent).

[15] 1 Harl, *Farm Income Tax Manual* § 2.10[3] (2010 ed.).

[16] 1 Harl, *Farm Income Tax Manual* § 2.10[3], [3][e] (2010 ed.).

[17] Rev. Proc. 2008-52, § 5.04(3)(c)(i), 2008-2 C.B. 587.

[18] Rev. Proc. 2008-52, § 5.04(3)(c)(ii), 2008-2 C.B. 587.

[19] Rev. Rul. 2008-52, § 5.04(3)(c), 2008-2 C.B. 587.

[20] Pub. L. No. 107-16, § 542(a), 115 Stat. 38 (2001), enacting I.R.C. § 1022 (carryover basis after 2009 with specified adjustments to the carryover basis figure but subject to "sunsetting" after 2010).

[21] See I.R.C. § 1014(a).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

FEDERAL FARM PROGRAMS

FARM PROGRAMS. The CCC has adopted final regulations amending the regulations for the Direct and Counter-cyclical Payment Program (DCP) for the 2008 through 2012 crop years and Average Crop Revenue Election (ACRE) Program for the 2009 through 2012 crop years. The amendments clarify various provisions in the regulations and extend benefits to additional producers. The amendments extend the eligibility for farms of less than 10 base acres from farms wholly owned by socially disadvantaged or limited resource producers to farms that are at least half owned by such producers. The amendments remove a provision terminating base acres on federally-owned land, which will effectively extend DCP and ACRE program eligibility to producers who lease or purchase such land. Clarifying amendments specify the extended 2009 crop year enrollment and election period, simplify acreage and production reporting requirements, correct contract termination provisions, and add 2009 through 2012 loan rates. The amendments also make several clarifying amendments to the regulations for the Emergency Assistance for Livestock, Honeybees, and Farm-Raised Fish Program and the Livestock Forage Disaster Program, the Supplemental Revenue Assistance Payments Program and the Marketing Assistance Loans and Loan Deficiency Payments Programs. The amendments clarify eligibility requirements for foreign persons for CCC and FSA programs. **75 Fed. Reg. 19185 (April 14, 2010)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION-SKIPPING TRANSFERS. The taxpayers, husband and wife, created a charitable lead annuity trust for a charitable organization and several grandchildren. The accounting firm which prepared the Form 709 for the trust failed to properly allocate the generation skipping transfer exemptions equally between the taxpayers. The IRS granted an extension of time to allocate one-half of the GST exemption to each taxpayer. **Ltr. Rul. 201014032, Nov. 16, 2009**.

Two trusts were established prior to September 25, 1985 for the benefit of the grantor's child, with the child's heirs as remainder holders. The trustees obtained amendment of the trusts to change the terms involving the power to appoint, remove and replace the trustees and creating provisions for investment advisors. The IRS ruled that the amendments did not subject the trusts to GSTT because the amendments did not change or transfer any beneficial interest in the trusts. **Ltr. Rul. 201015025, Dec. 30, 2009**.

SPECIAL USE VALUATION AND OTHER ELECTIONS ON LATE-FILED RETURNS. The decedent's personal representative hired an attorney and a tax professional to handle the probate proceedings and tax returns for the estate. Although the tax professional filed one extension for the estate tax return, the tax professional did not file any further extensions or the estate tax return for six years. The tax professional was fired and a new tax professional hired who filed the estate tax return making elections under I.R.C. §§ 2032A (special use valuation), 2057 (qualified family-owned business deduction) and 6166 (installment payment of estate tax). The IRS held that the special use valuation and qualified family-owned business deduction elections would be allowed but the installment payment of tax election could not be allowed because the election was required by statute to be made on a timely filed return. In addition, the IRS ruled that the estate was subject to the I.R.C. § 6651(a) addition to tax for late filing because the estate could not rely on a tax professional for timely filing of the return. **Ltr. Rul. 201015003, Oct. 26, 2009**.

FEDERAL INCOME TAXATION

BUSINESS INCOME. The IRS assessed additional taxes based on two bank deposits made to the taxpayer's business account. The taxpayer claimed that the deposits were either proceeds of insurance, borrowed funds or transfers from a savings account, but did not specify the source of the two checks. The taxpayer provided no evidence to support any of these theories as to the source of the funds. The court held that the IRS determination that the deposits were income was not refuted; therefore, the deposits were taxable income. An accuracy penalty was assessed and approved because the taxpayer failed to provide any reasonable cause for the failure to include the amounts in income. **Wright v. Comm'r, T.C. Summary Op. 2010-50**.

CASUALTY LOSS. The taxpayers, husband and wife, suffered water damage to their residence from a burst water pipe in 2004. The taxpayers received payment from their property insurer but claimed that the loss was much greater than the insurance payment, based on loss of use and an appraisal conducted in 2007. However, the taxpayers adjusted the appraisal using information from an online real estate service and parts of the appraisal. The court rejected the taxpayers' claimed value as not based on reasonable adjustments of the appraisal. In addition, the court rejected the taxpayers' claimed loss as unsupported by a professional assessment of the loss. The court also rejected allowing any loss deduction for "loss of use," noting that the deduction was limited to actual physical damage. **Sykes v. Comm'r, T.C. Memo. 2010-84**.

CHANGE OF ADDRESS. The IRS has issued updated procedures for determining a taxpayer's "last known address" which is used for all IRS communications with taxpayers, including refunds. In general, taxpayers are encouraged to submit change of address, Form 8822; however, any clear and concise notification by the taxpayer to the IRS of a change in address will be sufficient. **Rev. Proc. 2010-16, I.R.B. 2010-19**.

CHARITABLE DEDUCTION. The IRS has issued a Chief Counsel advice letter discussing the requirements for a valid deduction for creation of a facade easement, including substantiation, valuation, and substantial compliance rules. **CCA Ltr. Rul. 201014056, March 3, 2010**.

COURT AWARDS AND SETTLEMENTS. The taxpayer filed a personal injury claim against an employer for injuries received from the employer's employees and agents. The parties reached a settlement and the taxpayer received payment, none of which was for punitive damages or interest. The IRS ruled that the settlement payment was excludible from taxable income except for amounts paid for medical expenses which were deducted by the taxpayer. **Ltr. Rul. 201014040, Dec. 9, 2009**.

DISASTER LOSSES. On March 23, 2010, the President determined that certain areas in New Jersey are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of a severe winter storm, which began on February 5, 2010. **FEMA-1889-DR.** On March 24, 2010, the President determined that certain areas in the District of Columbia are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on February 5, 2010. **FEMA-1890-DR.** On March 25, 2010, the President determined that certain areas in Maine are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on February 25, 2010. **FEMA-1891-DR.** On March 29, 2010, the President determined that certain areas in New Hampshire are eligible for assistance from the government under the Act as a result of a severe winter storm, which began on February 23, 2010. **FEMA-1892-DR.** On March 29, 2010, the President determined that certain areas in West Virginia are eligible for assistance from the government under the Act as a result of severe storms, flooding and landslides which began on March 12, 2010. **FEMA-1893-DR.** On March 29, 2010, the President determined that certain areas in Rhode Island are eligible for assistance from the government under the Act as a result of severe storms and flooding which began on March 12, 2010. **FEMA-1894-DR.** On March 29, 2010, the President determined that certain areas in Massachusetts are eligible for assistance from the government under the Act as a result of severe storms, flooding and landslides which began on March 12, 2010. **FEMA-1895-DR.** On March 31, 2010, the President determined that certain areas in Delaware are eligible for assistance from the government under the Act as a result of severe winter storms which began on February 5, 2010. **FEMA-1896-DR.** On April 2, 2010, the President determined that certain areas in New Jersey are eligible for assistance from the government under the Act as a result of severe storms and flooding which began on March 12, 2010. **FEMA-1897-DR.** Accordingly, taxpayers in the areas may deduct the losses on their 2009 federal income tax returns. See I.R.C. § 165(i).

DISCHARGE OF INDEBTEDNESS. When the taxpayer was married, the taxpayer and spouse incurred credit card debt. As part of the divorce settlement, the spouse agreed to assume sole responsibility for the credit card debt. The credit card company forgave the debt and sent a Form 1099-C to the taxpayer, listing the debt as discharged. The taxpayer argued that the divorce agreement changed the borrower on the card solely to the spouse; therefore, the forgiven debt was not income to the taxpayer. The court found that the credit card debt was incurred when the taxpayer was the borrower and that the divorce agreement did not change that fact but only gave the taxpayer a right of indemnification for any costs incurred on the debt. The court held that the taxpayer was the borrower liable for the debt when the amount was forgiven; therefore, the amount of the forgiven debt was income to the taxpayer. **Jensen v. Comm'r, T.C. Memo. 2010-77**.

DOMESTIC PRODUCTION DEDUCTION. The taxpayer developed a genetic modification for biological products, unspecified in the ruling. The modification is sold three ways (1) the taxpayer sold a product containing the modification to distributors and wholesalers in commercial quantities; (2) the taxpayer licensed the right to reproduce the same product which is sold by the licensee under the taxpayer's brand; and (3) the taxpayer licensed the right to reproduce the same product which is sold by the licensee under a different brand. The IRS ruled that in (1) the gross receipts from the sales were qualified domestic production gross receipts for purposes of I.R.C. § 199. In (2) and (3) the proceeds of the licenses are not domestic production gross receipts because the receipts result from the sale of an intangible, the license to make the product. **Ltr. Rul. 201014050, Nov. 16, 2009**.

The taxpayer was a tax-exempt farmers' marketing and purchasing cooperative. Members who do business with the taxpayer received distributions of the net proceeds of the taxpayer's marketing and sales activities in two forms: (1) advances, following delivery and acceptance of a member's commodities based on the pricing mechanism in the parties' written contracts; and (2) patronage dividends, calculated on a patronage basis and distributed at the end of each fiscal year, based on the taxpayer's net proceeds from its marketing and sales activities and in accordance with its bylaws. The IRS ruled that the advances were properly included in domestic production activities income under I.R.C. § 199 as per-unit retain allocations paid in money under I.R.C. §§ 1382(b)(3) and 1388(f) because: (1) the payments were distributed with respect to the crops that the cooperative marketed for its patrons; (2) the patrons received the payments based on the quantity of crop delivered; (3) the payments were determined without reference to the cooperative's net earnings; (4) the payments were paid pursuant to a contract with the patrons establishing the necessary pre-existing agreement and obligation; and (5) the payments were paid within the payment period of I.R.C. § 1382(d). **Ltr. Rul. 201015018, Jan. 5, 2010**.

HEALTH CARE TAX CREDIT. The IRS has announced that it has mailed postcards to more than four million small businesses and tax-exempt organizations to make them aware of the benefits of the recently enacted small business health care tax credit. In general, the credit is available to small employers that pay at least half the cost of single coverage for their employees in 2010. The credit is specifically targeted to help small businesses and tax-exempt organizations that primarily employ low- and moderate-income workers. For tax years 2010 to 2013, the maximum credit is 35 percent of premiums paid by eligible small business employers and 25 percent of premiums paid by eligible employers that are tax-exempt organizations. The maximum credit goes to smaller employers — those with 10 or fewer full-time equivalent (FTE) employees — paying annual average wages of $25,000 or less. Because the eligibility rules are based in part on the number of FTEs, not the number of employees, businesses that use part-time help may qualify even if they employ more than 25 individuals. The credit is completely phased out for employers that have 25 FTEs or more or that pay average wages of $50,000 per year or more. Eligible small businesses can claim the credit as part of the general business credit starting with the 2010 income tax return they file in 2011. For tax-exempt organizations, the IRS will provide further information on how to claim the credit. **IR-2010-48**.

INNOCENT SPOUSE. While the taxpayer was married, the taxpayer and spouse operated a painting business. The taxpayer did the painting and the spouse handled the records and customers. In the divorce decree, the taxpayer was awarded the business and assets. The couple had filed joint returns and owed taxes for two years. The taxpayer sought innocent spouse relief but the court held that the taxpayer was properly denied statutory or equitable innocent spouse relief because the taxpayer failed to show that the tax was attributable to the ex-spouse's income or that any of the other factors favored innocent spouse relief. **Franc v. Comm'r, T.C. Memo. 2010-79**.

While the taxpayer was married, the taxpayer and spouse had separate incomes. During the time the couple were separated, but not divorced, the taxpayer initially filed a separate return for a prior tax year. The spouse was assessed for unpaid taxes for that year. As part of the divorce proceedings, the taxpayer filed a joint return with the spouse for the prior tax year that the taxpayer had filed a separate return, with the spouse's unpaid taxes included. The divorce decree split the liability for the unpaid taxes equally between the parties and the taxpayer filed for innocent spouse relief as to the ex-spouse's share of the joint liability. The court held that the taxpayer was not entitled to equitable spouse relief because (1) the taxpayer would not suffer economic hardship because the collection of the taxes would occur only for 10 years; (2) the taxpayer had reason to know that the ex-spouse would not pay the taxes because of a pending bankruptcy; and (3) the taxpayer did not file all returns timely. **Schepers v. Comm'r, T.C. Memo. 2010-80**.

INVESTMENT INTEREST ELECTION. The taxpayer timely filed a tax return which included Form 4952, Investment Interest Expense Deduction. The taxpayer identified an amount as net capital gain from the sale of the taxpayer's interest in a business. Pursuant to the Form 4952, the taxpayer elected to treat part of the net capital gain as investment income which equaled the entire amount of the taxpayer's investment interest expense. The taxpayer elected to convert enough of the net capital gain to investment income to allow a deduction for the full amount of investment interest expense. The IRS audited the taxpayer's income tax returns for that year and the two preceding years. As a result of that audit, the taxpayer suspended certain investment interest deductions, taken during the previous tax years, under the "at risk" rules. As a result, the taxpayer had additional investment interest expenses for the current tax year and the amount of investment income converted from net capital gain originally is now insufficient to allow deduction of these additional expenses. The taxpayer sought to modify the dollar amount of the election to treat net capital gain as investment interest expense for the taxable year. The taxpayer wanted to increase the amount of his election in order to use so much of the amount as necessary as investment income to allow deduction of all of the investment interest in the tax year, which had increased in amount due to the exam and resulting settlement agreement with the IRS. The IRS granted an extension of time to change the election, noting that the change would not result in any lower tax liability. **Ltr. Rul. 201015026, Jan. 7, 2010**.

IRA. The taxpayer received early distributions from an IRA which the taxpayer intended to be temporary loans needed while the taxpayer suffered from low income. The taxpayer did not include the distributions in income or pay the 10 percent additional tax for early distributions. The taxpayer argued that the distributions were only loans. The court held that there was no provision or exception for loans from IRAs to be treated differently from other distributions; therefore, the early distributions were taxable income and subject to the 10 percent additional tax. **Colegrove v. Comm'r, T.C. Summary Op. 2010-44**.

INVOLUNTARY CONVERSION. The taxpayer owned real property against which the state instituted eminent domain proceedings. The taxpayer negotiated a temporary easement over the property for the state but the agreement did not prevent the state from continuing the eminent domain proceedings once the easement expired. The taxpayer claimed that the easement and threat of future eminent domain proceedings prevented the further development of the property and sought to purchase other property to develop. The taxpayer sought nonrecognition treatment for reinvestment of the proceeds received from the transfer of the easement. The IRS ruled that the reinvestment of the easement proceeds in a fee interest in other real property for a similar use was eligible for involuntary exchange non-recognition of gain treatment. The IRS ruled that the easement interest in the current property was a similar interest to a fee interest in the replacement property. **Ltr. Rul. 201015015, Jan. 5, 2010**.

NET OPERATING LOSSES. The taxpayers operated a tavern and claimed net operating losses for two tax years. The taxpayers were unable to provide written evidence to support the losses, claiming that a flood had destroyed the business records. The taxpayer offered only prior tax returns as evidence for the net operating losses. The court held that the tax returns were insufficient evidence to support allowance of NOLs in an amount greater than allowed by the IRS. **Lehman v. Comm'r, T.C. Memo. 2010-74**.

PASSIVE ACTIVITY LOSSES. The taxpayer owned a cabin which was rented to the public by a management company. During the tax year, the cabin was rented for 12 days and nine nights. The taxpayer visited the cabin for 27 days and 19 nights during the same year. The taxpayer claimed deductions for the cabin on Schedule E which were disallowed by the IRS. The court held that the rental of the cabin was not a rental activity under Treas. Reg. § 1.469-1T(e)(3)(i) because the average rental period was less than seven days; therefore, the losses from the activity were not eligible for the allowance of up to $25,000 of losses under I.R.C. § 469(i). The taxpayer was unable to demonstrate that the taxpayer spent more than 100 hours participating in the rental activity; therefore, the court held that the rental activity was a passive activity for which any losses could only offset passive activity income. In addition, the court held that the cabin was a personal residence because the taxpayer's use exceeded 14 days and exceeded 10 percent of the time the cabin was rented to others. As a personal residence, the taxpayer was entitled to deduct mortgage interest on Schedule A. **Akers v. Comm'r, T.C. Memo. 2010-85**.

The taxpayer owned several rental real estate properties and claimed deductions for losses over several tax years as if the properties were all part of a single activity. The court found that the taxpayer had demonstrated that the taxpayer had performed over 750 hours of work in the activity each year and was a real estate professional for purposes of I.R.C. § 469(c)(7)(A) but was not entitled to combine the properties into a single activity because the taxpayer failed to properly make the election to combine the activities on a tax return. The taxpayer argued that the treatment of the properties as a combined activity on the several years of returns created a deemed election, but the court held that the election could be properly made only by filing a statement with a filed return. **Trask v. Comm'r, T.C. Memo. 2010-78**.

The taxpayers, husband and wife, represented that they were in the real property business and inadvertently failed to make the election under I.R.C. § 469(c)(7)(B) to treat all interests in rental real estate as a single business activity. The IRS granted an extension of time to file an amended return with the election. **Ltr. Rul. 201014038, Dec. 8, 2009**.

PENALTIES. The taxpayers, husband and wife, each owned 50 percent of a corporation and were employees of the corporation. The corporation obtained life insurance policies on the taxpayers and distributed the policies to the taxpayers. The taxpayers under-reported the taxable income from distribution based on their belief that a revised From 1099-R would be issued with lower amounts. The revised 1099-R was issued by the insurance company but was also incorrect. The court upheld assessment of a substantial understatement penalty because the taxpayers failed to demonstrate that they reasonably relied on their income tax return preparer or the insurance company in under-reporting the taxable income from the distribution of the insurance policies. **Whitmarsh v. Comm'r, T.C. Memo. 2010-83**.

PERSONAL SERVICE CORPORATION. The taxpayer corporation operated a land surveying business and did not employ or work with licensed engineers. The IRS determined that the taxpayer was a personal service corporation under Treas. Reg. § 1.448-1T(e)(4)(i) which states that surveying was in the field of engineering. The taxpayer argued that surveying was not engineering because surveyors were licensed separately under state law. The taxpayer noted that a licensed engineer could not perform surveying without a surveyor's license. The court noted that state laws do not control federal law. The court held that surveying was ordinarily considered part of engineering; therefore, a corporation which performs surveying is properly taxed as a personal service corporation. **Kraatz & Craig Surveying Inc. v. Comm'r, 134 T.C. No. 8 (2010)**.

RETURNS. The IRS has published a discussion about refund status and recordkeeping, *Refund Information*. Taxpayers can go online to check the status of any 2009 refund 72 hours after IRS acknowledges receipt of an e-filed return, or three to four weeks after a paper return was mailed. Taxpayers should be sure to have a copy of the 2009 tax return available because they will need to know their filing status, the first Social Security number shown on the return, and the exact whole-dollar amount of the refund. Taxpayers have three options for checking on a refund: go to IRS.gov, and click on "Where's My Refund;" call 1-800-829-4477 24 hours a day, seven days a week for automated refund information; or call 1-800-829-1954 during the hours shown in your tax form instructions. *What Records Should I Keep*? Normally, tax records should be kept for three years, but some documents, such as records relating to a home purchase or sale, stock transactions, IRAs and business or rental property, should be kept longer. Taxpayers should keep copies of tax returns filed and the tax forms package as part of all records. They may be helpful in amending already filed returns or preparing future returns. **IRS Tax Tip 2010-74**.

The IRS has issued a revised Form 3115, Application for Change in Accounting Method. The IRS will allow use of the previous Form 3115 through May 30, 2010. **Ann. 2010-32, I.R.B. 2010-19**.

The IRS has issued a draft Schedule UTP and instructions which will be used by taxpayers for reporting uncertain tax positions. The draft schedule and instructions provide that, beginning with the 2010 tax year, the following taxpayers with both uncertain tax positions and assets equal to or exceeding $10 million will be required to file Schedule UTP if they or a related party issued audited financial statements: (1) Corporations which are required to file a Form 1120, U.S. Corporation Income Tax Return; (2) Insurance companies which are required to file a Form 1120 L, U.S. Life Insurance Company Income Tax Return or Form 1120 PC, U.S. Property and Casualty Insurance Company Income Tax Return; and (3) Foreign corporations which are required to file Form 1120 F, U.S. Income Tax Return of a Foreign Corporation. **Ann. 2010-30, I.R.B. 2010-19**.

SAFE HARBOR INTEREST RATES
May 2010

	Annual	Semi-annual	Quarterly	Monthly
		Short-term		
AFR	0.79	0.79	0.79	0.79
110 percent AFR	0.87	0.87	0.87	0.87
120 percent AFR	0.95	0.95	0.95	0.95
		Mid-term		
AFR	2.87	2.85	2.84	2.83
110 percent AFR	3.16	3.14	3.13	3.12
120 percent AFR	3.45	3.42	3.41	3.40
		Long-term		
AFR	4.47	4.42	4.40	4.38
110 percent AFR	4.92	4.86	4.83	4.81
120 percent AFR	5.37	5.30	5.27	5.24

Rev. Rul. 2010-12, I.R.B. 2010-18.

S CORPORATIONS

SECOND CLASS OF STOCK. The taxpayer S corporation issued shares of voting and non-voting stock with identical rights to distributions and liquidation proceeds. The taxpayer's stock was subject to sale restrictions and right of the taxpayer to purchase stock from a non-qualified shareholder. The taxpayer created a stock option plan and a restricted stock plan for key employees. The IRS ruled that the sale restrictions and stock plans did not create second classes of stock. **Ltr. Rul. 201015017, Jan. 7, 2010**.

WITHHOLDING TAXES. In a Chief Counsel Advice letter, the IRS discussed the issues involving withholding of social security (FICA) taxes on wages paid to nonresident alien students temporarily in the U.S. on visas. According to the letter, employers of these students are withholding the taxes even though such withholding is not required and payment of such taxes is not required. The IRS stated that there was little it could do about the practice but advised the students to seek refunds of the employment taxes, although acknowledging that it took some time to obtain a refund. The IRS noted that withholding of income taxes by employers of nonresident aliens is different because such employee are not eligible for the Making Work Pay Credit. Such employers should access Notice 1392 and Publication 15. **CCA Ltr. Rul. 201014067, March 1, 2010**.

NUISANCE

WATER RUNOFF. The plaintiffs owned land neighboring a dairy owned and operated by the defendants. The plaintiffs brought an action in nuisance and trespass, alleging that rain water overflowed waste ponds onto the plaintiffs' land. The defendants pled the affirmative defense that Tex. Agric. Code §§ 251.003, 251.004 prohibited the action because the dairy had been in operation without substantial change for more than one year before the alleged damages occurred. The defendants produced an expert who testified that the dairy had operated in compliance with state discharge permits for almost 15 years. The court held that the statute applied to prohibit a nuisance action against the dairy. The court also held that the trespass action was barred by the statute in that the alleged trespass was a covered nuisance under the statute. **Ehler v. LVDVD, L.C., 2010 Tex. App. LEXIS 1850 (Tex. Ct. App. 2010)**.

NEGLIGENCE

VETERINARIAN. The plaintiff owned a mare which was brought to the defendant's veterinary practice for artificial insemination. During the time at the defendant's business, the mare was placed in a pasture with another mare in order to help calm the plaintiff's mare. The plaintiff's mare was injured during the time in the pasture, allegedly from a kick from the other mare. The injury sufficiently damaged the plaintiff's mare to make her unsuitable for breeding and the plaintiff sued in negligence for the damage to the mare. The defendant counterclaimed that the plaintiff's suit was in violation of a hold harmless clause in the boarder agreement signed by the plaintiff. The trial court found that the plaintiff did not warn the defendant that the mare should not be pastured with any other horses; therefore, the defendant was not negligent in placing the horses in the same pasture. Under the hold harmless clause in the boarding contract, the plaintiff agreed not to sue for any damages except in the case of gross negligence or willful misconduct. The court held that, because the plaintiff did not allege gross negligence or willful misconduct by the defendant, the lawsuit violated the boarding agreement. The court noted evidence that the plaintiff was familiar with hold harmless clauses and used such clauses in the plaintiff's own equestrian activities. The court held that the hold harmless clause was not void for violating public policy, noting that the plaintiff had plenty of choices as to where the mare was to be bred. **Dow-Westbrook, Inc. v. Candlewood Equine Practice, LLC, 2010 Conn. App. LEXIS 78 (Conn. Ct. App. 2010)**.

SECURED TRANSACTIONS

AGRICULTURAL SUPPLIER'S LIEN. The plaintiff had loaned operating funds to a turkey farmer. The loan was secured by all "poultry" and accounts. The farmer obtained young turkey poults from the defendant but failed to pay for the young birds. After the birds were raised to sale weight, they were sold and a check was made out to the farmer and the plaintiff. The defendant filed an agricultural supplier's lien under N.D.C.C. ch. 35-31. The plaintiff filed an action to declare that its security interest had priority over the proceeds of the sale of the birds because the defendant did not have a proper agricultural supplier's lien. The appellate court affirmed the trial court's holding that the young turkey poults were supplies covered by the agricultural supplier's lien statute and the defendant had a priority interest in the proceeds of the farm products, the mature turkeys, sold by the farmer. **Great Western Bank v. Willmar Poultry Co., 2010 N.D. LEXIS 51 (N.D. 2010)**.