Cases, Regulations and Statutes

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EPA could use the authority of CWA section 308 to obtain this information from CAFOs that fall within areas that have been identified as having water quality concerns likely associated with CAFOs (focus watersheds). However, under the regulations the EPA would make every reasonable effort to assess the utility of existing publicly available data and programs to obtain identifying information about CAFOs by working with partners at the federal, state, and local levels before determining whether an information collection request is necessary. EPA also requests comment on three alternative approaches to gather information about CAFOs, which could be used to achieve the objectives of this proposed action in protecting water quality. 76 Fed. Reg. 65431 (Oct. 21, 2011).

DISASTER DESIGNATIONS. The FSA has issued proposed regulations amending the disaster designation regulations with simplified procedures for designating USDA Secretarial disaster areas. Proposed changes to the regulation would delegate the designation authority to FSA State officials, remove the requirement that a request for designation of a disaster area be initiated and submitted by a state governor or Indian Tribal Council to the Secretary, add a simplified disaster designation in severe drought situations, and change the USDA Secretarial disaster designation process from six steps to two steps for natural disasters, including special provisions for certain drought situations. FSA proposes to move the regulations to the same chapter of the Code of Federal Regulations as the FSA Emergency Loan Program regulations. 76 Fed. Reg. 70368 (Nov. 14, 2011).
FEDERAL ESTATE AND GIFT TAXATION

ALTERNATE VALUATION. The executrix of the decedent’s estate hired an attorney to prepare the decedent’s estate tax return but the attorney failed to advise the executrix about the alternate valuation election under I.R.C. § 2032. The IRS granted the estate an extension of time to file the election. Ltr. Rul. 201144011, July 25, 2011.

GENERATION-SKIPPING TRANSFERS. The IRS has adopted as final regulations that provide rules relating to the disclosure of listed transactions and transactions of interest with respect to the generation-skipping transfer tax under I.R.C. § 6011, conforming amendments under I.R.C. §§ 6111 and 6112, and rules relating to the preparation and maintenance of lists with respect to reportable transactions under I.R.C. § 6112. The regulations affect taxpayers participating in listed transactions and transactions of interest and material advisors to such transactions. The regulations also contain rules under I.R.C. § 6112 that affect material advisors to reportable transactions. The regulations provide guidance regarding the length of time a material advisor has to prepare the list that must be maintained after the list maintenance requirement first arises with respect to a reportable transaction. The regulations also clarify guidance regarding designation agreements. 76 Fed. Reg. 70340 (Nov. 14, 2011).

The taxpayer was the beneficiary of a pre-1985 irrevocable trust with remainders held by the taxpayer’s heirs. The taxpayer held a special testamentary power of appointment over the trust corpus to disproportionately allocate the trust principal to the heirs. The IRS ruled that the special testamentary power of appointment did not cause the trust to be subject to GSTT. Ltr. Rul. 201143002, July 15, 2011.

The decedents, husband and wife, had created trusts for their children and heirs. In the first tax year, the decedents transferred property to the trusts and filed gift tax returns which allocated their GST exemptions to the transfers. In the second tax year, additional transfers were made, but after the decedents’ deaths, it was discovered that no gift tax return or allocation of the GST exemptions had been made. The IRS granted an extension of time to file the gift tax returns with the GST exemption allocations. Ltr. Rul. 201143001, July 19, 2011.

The taxpayers, husband and wife, created a trust for each of their two children and the husband made gifts of money to each trust. The taxpayers hired an accountant to file their Forms 709 but the accountant failed to include the gifts to the trusts. The IRS granted an extension of time to file an amended Form 709 with the transfers and with allocation of the taxpayers’ GST exemption to the gifts. Ltr. Rul. 201144026, July 28, 2011.

INSTALLMENT PAYMENT OF ESTATE TAX. In a Chief Counsel Advice letter, the IRS stated: “The question being posed is whether making the election under section 6166(b)(8) means the treatment specified therein applies to the entirety of the estate tax, or just the portion qualifying under 6166(b)(8). The estate says it’s just the qualifying portion; the service center has opined (without providing any reasoning) that it’s the entirety of the tax. Very few legal authorities even mention 6166(b)(8), and those that do focus on the fact that 6166(b)(8) was designed to qualify certain interests for installment-payment treatment that would otherwise not qualify. Since neither the statute nor any authorities mention the availability of a ‘bifurcated’ election (what the estate is urging) . . . such an election is not available — rather, the estate has to either elect to avail itself of 6166(b)(8), thus forfeiting the deferral option provided by section 6166(a)(3), or not make a 6166(b)(8) election, preserving the option to defer payments that is provided in section 6166(a)(3).” CCA 201144027, Aug. 22, 2011.

RETAINED INTERESTS IN TRUSTS. The IRS has adopted as final regulations that provide guidance on the portion of trust property includible in the grantor’s gross estate if the grantor has retained the use of the property, the right to an annuity, unitrust, graduated retained interest, or other payment from such property for life, for any period not ascertainable without reference to the grantor’s death, or for a period that does not in fact end before the grantor’s death. The IRS comments to the proposed regulations explained: “. . . the regulations provide the method to be used to determine the portion of trust corpus includible in the grantor’s gross estate if the grantor reserves a graduated retained interest in a trust. This method applies to graduated retained interests in property whether or not the property is held in trust. The portion of the corpus of a GRT or a CRT includible in the decedent’s gross estate under section 2036 is that portion of the trust corpus necessary to generate a return sufficient to pay the decedent’s retained annuity, unitrust, or other payment. Consistent with this approach, the proposed methodology measures the amount of corpus needed to generate sufficient income to produce the payments that would have been due even after the decedent’s death, as if the decedent had survived and continued to receive the retained interest. Thus, under the proposed methodology, the amount of corpus necessary to produce the retained graduated interest is the sum of the following amounts: (1) The amount of corpus required to generate sufficient income to pay, without reducing or invading principal, the annual amount payable to the decedent at the decedent’s death calculated pursuant to [Treas. Reg.] Sec. 20.2036-1(i); and (2) for each succeeding year of the trust, the amount of corpus required to generate sufficient income to pay, without reducing or invading principal, the increase (if any) in the annuity, unitrust, or other payment for that year, deferred until the beginning date of that increase. The formula to be applied in calculating the corpus for each such succeeding year of the trust is the product of two factors: the first is the result of dividing the periodic addition (adjusted for payments made more frequently than annually, if applicable, and for payments due at the beginning, rather than the end, of a payment period (See Table K or J of [Treas. Reg.] Sec. 20.2031-7(d)(6)) by the section 7520 rate (periodic addition/rate); and
the second is $1$ divided by the sum of $1$ and the section 7520 rate raised to the $T$ power ($\frac{1}{1 + \text{rate}}^T$). For purposes of this formula, $T$ is the time (expressed in years or a portion of a year) between the date of the decedent’s death and the first day of the trust’s first year for which the periodic addition is payable. The periodic addition for each year after the year in which the decedent’s death occurs is the amount (if any) by which the annuity, unitrust, or other payment that would have been payable for that year (if the decedent had survived) exceeds the total amount of payments for the year immediately preceding that year, provided that payments increase (and do not ever decrease).” 76 Fed. Reg. 69126 (Nov. 8, 2011).

TRANSFERS WITH RETAINED INTERESTS. The decedent had created a family limited partnership and transferred a substantial portion of the decedent’s property to the FLP. The decedent later transferred shares in the FLP to trusts for the decedent’s heirs. The court found that the decedent had no legitimate or significant non-tax reason for creation of the FLP and the transfer of property to the FLP was not a bona fide sale because the decedent did not receive a partnership interest equivalent to the value of the assets contributed, the contributed assets were not fully credited to the decedent’s capital account, and the other family members received interests and capital in excess of the property they contributed. In addition, the court found that the decedent commingled FLP funds with the decedent’s own, the decedent received disproportionate distributions and the transfers left the decedent without sufficient funds to pay personal expenses. The court held that the property transferred to the FLP was included in the decedent’s gross estate because the decedent retained too much control over the contributed property after the transfers. Estate of Liljestrand v. Comm’r, T.C. Memo. 2011-259.

FEDERAL INCOME TAXATION

ALIMONY. The taxpayer was divorced and, under the divorce decree, was required to pay the mortgage payments, taxes, and insurance on the marital home in which the ex-spouse continued to reside. The decree also provided that, if the home was sold, the proceeds would be used to pay off the mortgage but the taxpayer was to continue to pay the ex-spouse the pay-off amount at 8 percent interest until the original mortgage period expired. The home was sold and the taxpayer started making the payments. The taxpayer claimed the payments as alimony deductions but the IRS disallowed the deductions. The court held that the payments were not alimony because they would not terminate upon the ex-spouse’s death but were tied to the original mortgage term. Moore v. Comm’r, T.C. Memo. 2011-265, denying reconsideration, T.C. Memo. 2011-200.

The taxpayer was divorced and the divorce decree stated that each party was barred from asserting any claim “for maintenance, formerly known as alimony,” and it incorporated by reference the terms of the settlement agreement which provided for payment to the spouse of one-half of the taxpayer separation pay from the military. The taxpayer claimed the payment as deductible alimony. I.R.C. § 71(b)(1)(B) requires that the divorce instrument “not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215.” The court held that the payment was not deductible as alimony because the divorce decree expressly provided that no alimony would be paid. Shelton v. Comm’r, T.C. Memo. 2011-266.

CAPITAL GAINS. The taxpayer sold a fishing vessel but retained the vessel’s catch history and license limitation permit in order to obtain an allocation of fishing rights in a fishing area. In the next tax year and subsequent tax years, the taxpayer assigned the fishing allocation to a cooperative on an annual basis and received payments for the amount of fish caught under the allocation. In a Chief Counsel Advice letter, the IRS ruled that the proceeds of the transactions were ordinary income to the taxpayer because the fishing rights were not property under I.R.C. § 1221 but constituted merely a time-limited interest in using the right to fish under the allocation. CCA 201144023, July 28, 2011.

COMPENSATION. The taxpayer used an accrual method of accounting for federal income tax purposes and paid bonuses to a group of employees pursuant to a program that defined the terms and conditions under which the bonuses are paid for a taxable year. The taxpayer communicated the general terms of the bonus program to employees when they become eligible and whenever the program is changed. Under the program, bonuses are paid to the taxpayer’s employees for services performed during the taxable year and the minimum total amount of bonuses payable under the program to the taxpayer’s employees as a group was determinable either (1) through a formula that is fixed prior to the end of the taxable year, taking into account financial data reflecting results as of the end of that taxable year, or (2) through other corporate action, such as a resolution of the taxpayer’s board of directors or compensation committee, made before the end of the taxable year, that fixed the bonuses payable to the employees as a group. To be eligible for a bonus, an employee must perform services during the taxable year and be employed on the date that the taxpayer pays bonuses. Under the program, bonuses were paid after the end of the taxable year in which the employee performed the related services but before the 15th day of the third calendar month after the close of that taxable year. Under the program, any bonus amount allocable to an employee who was not employed on the date on which the taxpayer pays bonuses was reallocated among other eligible employees. The IRS ruled that the taxpayer could take a deduction in the current year for a fixed amount of bonuses payable to a group of employees even though the taxpayer did not know which of the employees will receive a bonus or the amount of any particular bonus until after the end of the taxable year. Rev. Rul. 2011-29, I.R.B. 2011-49.

COOPERATIVES. The taxpayer was a tax-exempt electric cooperative. The taxpayer started a policy to allow patrons to receive immediate distributions of future patronage payments,
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discounted for the present value of the future payments. The discounted amount was placed in the cooperative equity. The IRS ruled that the accelerated patronage policy did not affect the taxpayer’s status as a tax-exempt cooperative. Ltr. Rul. 201143021, Aug. 1, 2011.

CORPORATIONS

CONTRIBUTIONS. The taxpayer corporation owned an LLC, a disregarded entity, which received grant money from a state under a program designed to help existing businesses remain and expand in the state so as to enhance their job-creating activities. The funds were used for renovation of buildings and fixtures and equipment for use in the buildings. The IRS ruled that the grant funds were non-shareholder contributions to the taxpayer and not included in the taxpayer’s income under I.R.C. § 118(a). Ltr. Rul. 201144006, Aug. 5, 2011.

SHAREHOLDER. The taxpayer had been the sole owner of a corporation which operated a mortgage brokerage. The taxpayer hired an agent to sell the business and a buyer was found. The transaction was closed in December 2003, with a transfer of the stock and the hiring of the taxpayer as an employee and officer of the corporation. The taxpayer claimed deductions for losses incurred by the corporation and did not include in income amounts paid by the corporation for attorney fees associated with the bankruptcy proceedings of the corporation. The court held that the corporation losses incurred after the sale were not deductible by the taxpayer because the taxpayer no longer owned the corporation when the losses occurred. The court also held that the attorney fees paid by the corporation were excludible from the taxpayer’s income because the fees were reasonably incurred by the corporation after the sale of the corporation. Kinsey v. Comm’r, T.C. Memo. 2011-257.

DISASTER LOSSES. On October 14, 2011, 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 Tropical Storm Lee which began on September 6, 2011. FEMA-4039-DR. On October 18, 2011, the President determined that certain areas in Puerto Rico are eligible for assistance from the government under the Act as a result of Tropical Storm Maria which began on September 8, 2011. FEMA-4040-DR. On October 28, 2011, the President determined that certain areas in Louisiana are eligible for assistance from the government under the Act as a result of Tropical Storm Lee which began on September 1, 2011. FEMA-4041-DR. On November 4, 2011, the President determined that certain areas in Virginia are eligible for assistance from the government under the Act as a result of an earthquake which began on August 23, 2011. FEMA-4042-DR. On November 8, 2011, the President determined that certain areas in Vermont are eligible for assistance from the government under the Act as a result of severe storms and flooding which began on May 20, 2011. FEMA-4043-DR. On November 8, 2011, the President determined that taxpayers in the District of Columbia are eligible for assistance from the government under the Act as a result of an earthquake which began on August 23, 2011. FEMA-4044-DR. Accordingly, taxpayers in the areas may deduct

the losses on their 2010 federal income tax returns. See I.R.C. § 165(i).

EXCISE TAX. I.R.C. § 4161(b) imposes a manufacturer’s excise tax on the sale by the manufacturer, producer, or importer of certain described archery products. In a Chief Counsel Advice letter, the IRS discussed seven scenarios for a determination of who was the manufacturer, importer or producer of archery products in each scenario. CCA 201143019, Sept. 28, 2011.

INVESTMENT INCOME. The taxpayer timely filed Form 1040 for the taxable year and reported net capital gains and qualified dividends. In the same taxable year, the taxpayer incurred investment interest expense and carried over investment interest expense to the tax year from prior years. The taxpayer did not make an election under I.R.C. § 163(d)(4)(B)(iii) to treat qualified dividends as investment income. The taxpayer engaged and relied upon an accounting firm to prepare his Form 1040 but the firm did not inform taxpayer that an election under I.R.C. § 163(d)(4)(B)(iii) was available and taxpayer was unaware such an election existed. The IRS granted the taxpayer an extension of time to file an amended return with the election. Ltr. Rul. 201143004, July 28, 2011.

IRA. The taxpayer received an inherited amount from a relative’s IRA when the relative died. The taxpayer had the funds deposited in an IRA owned by the taxpayer. However, on the same day, the taxpayer requested a distribution of the same amount from the taxpayer’s IRA. The court held that the distribution from the taxpayer’s IRA was a taxable distribution. Although the rollover of the funds from the inherited IRA account to the taxpayer’s IRA was a tax-free rollover, the subsequent distribution from the taxpayer’s IRA was treated as any other distribution. Nipps v. Comm’r, T.C. Memo. 2011-267.

PENSION PLANS. For plans beginning in November 2011 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 4.16 percent, the corporate bond weighted average is 5.82 percent, and the 90 percent to 100 percent permissible range is 5.23 percent to 5.86 percent. Notice 2011-93, I.R.B. 2011-48.

QUALIFIED TUITION PLANS. The taxpayers had established a qualified tuition plan under I.R.C. § 529 for their children. In September 2008, the taxpayer requested and received distributions from the plans in order to pay household expenses. The taxpayers did not cash the checks but endorsed them and redeposited the checks in the plan. However, the plan still issued Form 1099-Q, Payments From Qualified Education Programs, listing the distributions. The court held that the distributions were income when the checks were received, independent of whether the checks were cashed or not. In addition, the distributions could not be considered rolled over to the same plan because the request for the distribution was characterized as a “non-qualified withdrawal” instead of a “withdrawal for rollover.” Karlen v. Comm’r, T.C. Summary Op. 2011-129.

REGISTERED TAX RETURN PREPARERS. The IRS has announced that enrolled retirement plan agents and applicants to become enrolled retirement plan agents are not required to
have a PTIN to apply for enrollment or renew enrollment as an enrolled retirement plan agent. Enrolled retirement plan agents must, however, obtain a PTIN if, for compensation, they prepare, or assist in the preparation of, all or substantially all of any tax return or claim for refund that is not on the list of forms exempt from the PTIN requirement as provided in section 1.03 of Notice 2011-6, 2011-3 C.B. 315, or any future guidance. Notice 2011-91, I.R.B. 2011-47.

S CORPORATION

ELECTION. The taxpayer was a corporation which, upon incorporation, had intended to make the election to be taxed as an S corporation but failed to timely file Form 2553, Election by a Small Business Corporation. The IRS granted an extension of time to file Form 2553. Ltr. Rul. 201143005, July 18, 2011.

The taxpayer was a corporation which, upon incorporation, had intended to make the election to be taxed as an S corporation but failed to timely file Form 8832, Entity Classification Election or Form 2553, Election by a Small Business Corporation. The IRS granted an extension of time to file Forms 8823 and 2553. Ltr. Rul. 201144012, July 13, 2011.


TRUSTS. The taxpayer created a qualified personal residence trust under which the taxpayer retained a term interest to possess and occupy the trust’s residence. The trust originally provided that, at the end of the term, the trust benefits passed to the taxpayer’s children, with distribution of the property at the death of the taxpayer and spouse. The taxpayer obtained a modification of the trust agreement to provide (1) the children would have a power to appoint an equal share of the trust corpus to themselves or to provide a further term interest in the residence as a gift to the taxpayer and spouse. The IRS ruled that, if the modification language followed the sample language of Rev. Proc. 2003-42, 2003-1 C.B. 993, the modifications did not disqualify the trust for special valuation status under I.R.C. § 2702. Ltr. Rul. 201144001, July 25, 2011.

STATE TAXATION OF AGRICULTURE

AGRICULTURAL USE. The plaintiff owned a 12 acre parcel of land which a communications company leased for a communications tower. The communications company had to acquire several zoning variances to allow the construction and use of the tower. The tower, surrounding fenced area and gravel road leading to the area covered about one-third of an acre, leaving most of the parcel vacant. The tenant paid all real property taxes on the entire parcel. The plaintiff entered into a lease with an apiary farming entity which placed eight hives on the property inside the fenced area. The bees were known to have used the surrounding area for honey production. The plaintiff sold the honey to a honey processing company. The plaintiff applied for a farmland property tax assessment which was denied for several years because less than five acres were devoted to agricultural use and less than $500 of sales were produced on the land. However, the defendant assessor agreed that the sales of honey exceeded $500 and that the entire parcel was used for the apiary activity, which qualified as an agricultural use. The defendant argued that the dominant use of the property was as a lease of the communications tower. The court agreed, holding that the dominant use of the land was intended to be as a communications tower, an activity for which the land was purchased and rezoned. In addition, the tower was a greater presence and produced more income than the apiary. Therefore, the court held that the farmland property assessment was properly denied. Atlantic Coast LEH, LLC v. Township of Little Egg Harbor, 2011 N.J. Tax LEXIS 7 (Tax Ct. N.J. 2011).

WINERY. The plaintiffs owned a .75 acre parcel in an area zoned as residential. The zoning ordinance allowed agricultural uses in the area. The plaintiffs planted 20 grape vines and used 12 of them for production of wine grapes with which the plaintiffs produced wines sold on the property. The plaintiffs also obtained grapes from others and produced wines also sold on the property. The defendant township filed for an injunction against the plaintiffs from selling wine. The court held that Ohio Code § 519.21(A) included the plaintiffs’ use as an agricultural use because the winery included the growing of grapes on the property. The court rejected the claim by the defendant that the plaintiffs’ use was not agricultural because only five percent of the wine was produced from grapes grown on the property. The court held that the statute did not require that the grapes grown on the property constitute the majority of the grapes used in the making of wine on the property. Terry v. Sperry, 2011 Ohio 3364, 2011 Ohio LEXIS 1790, (Ohio 2011).

HORSE STABLE. The plaintiffs owned a 130 acre horse farm in an area zoned as residential. However, the zoning ordinance for that area allowed agricultural uses, including “farming, dairying, pasturage, apiculture, horticulture, floriculture, viticulture and animal and poultry husbandry (including the breeding and raising of horses as an occupation).” The defendant owned and bred their own horses but also rented out 35 of their stalls to other horse owners. The defendant zoning board filed a cease and desist order as to the horse boarding activity as prohibited by the zoning ordinance. The plaintiffs argued that horse boarding was included in the definition of agricultural activity within the allowed activities of horse breeding and raising. The court held that the boarding activity was sufficiently different from breeding and raising horses that it was not included in the allowed activities under the zoning ordinance and the cease and desist order was properly served on the plaintiffs. LeCompte v. Zoning Board of Appeals for the Village of Barrington Hills, 2011 Ill. App. LEXIS 1014 (Ill. Ct. App. 2011).

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