Cases, Regulations and Statutes

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After the deaths of the parents, pleas by the on-farm heir for the sharing to tilt slightly in favor of their on-farm sibling may fall on a deaf ear with the retort that there never was undercompensation of anyone. And, in some instances, that may be correct. In any event, it is often difficult to get the off-farm heirs to see the world of compensation as the on-farm heirs see it.

The parents, seeing that the sharing of income is below what it should be, may be inclined to be more generous with the off-farm heirs. That move is hardly lost on the off-farm heirs who often do not find out about that until the parents are both out of the picture.

Craft a choice for the off-farm heirs

At some point, and this is at the judgment of the parents, depending upon when they are ready to begin sharing ownership of the farming operation with the entire family, it is important to make it clear that the sharing will be carried out on a basis of fairness and each of the children (or grandchildren or both) will have choices on how they will be able to participate in the farming operation.

• One type of arrangement may include an opportunity for the off-farm heirs to be or become happy, cheerful and contented investors. Experience has tended to show that such a strategy is more likely to succeed if the business plan at that point is a two-entity business plan –(1) a production entity that includes only the parents and the on-farm heir or heirs and (2) a land owning entity with participation in ownership open to all family members. Owners of the entities can be assured that if they wish to cash out of their family investment, an arrangement to do so has been built into the governing documents.

• The other type of arrangement, for those off-farm heirs who, for various reasons, would prefer not to be involved in the family operation, is to provide an “exit” strategy with a commitment to purchase the interests of the heirs who prefer not to become involved in landownership, to have their interest valued with payment to be made over a 15 to 20 year period with interest on a formula basis on the unpaid balance. Such an exit strategy should also be made available to the on-farm heirs. They should have the opportunity to make a mid-career shift if their interests and aspirations change, as well.

Level with the entire family

The biggest single mistake parents make is to fail to share their thinking with the entire family, but particularly with the off-farm heirs. The refrain is often heard, “they never shared a thing with us kids.” Even before career choices are made or commitments made to those showing some interest in the farming operation, it is wise for the parents to begin to share their thinking, emphasizing that their core objective is to be fair to every member of the family. As time goes on, and career choices are made, the parents should continue to share their thinking, emphasizing at every turn that their guiding objective is to be fair to the children, some of whom may have gone off to college and a career off the farm, other have gone off to college and returned to the farm and others have married and drifted off to the four corners of the world.

The reward for being transparent and completely open may be long in coming but it will, in almost every situation, be warmly regarded and favorably referred to after the parents have gone to assisted living or departed form this earth. It is perhaps the most enduring legacy the parents can leave behind.

ENDNOTES

1 See generally 5 Harl, Agricultural Law § 41.11[1], 41.12 (2012).
2 See 5 Harl, note 1 supra, at 41.02.
3 See 5 Harl, note 1 supra, at 41.03[1][c] (2012).

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CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

HORSE. The defendants were a trust which included a farm with a horse barn, a tenant who used the barn to board horses owned by others, and the owner of a horse boarded at the barn. The horse escaped with five other horses in search of food on a neighbor’s land. Another neighbor volunteered to attempt to lead the six horses back to their pasture but suffered injuries when kicked by the horse owned by one of the defendants. The plaintiff brought suit in strict liability and negligence. The trial court granted summary judgment for the horse owner and the trust. The plaintiff voluntarily dismissed the suit against the other defendants. The court upheld summary judgment on the claim of strict liability because Ohio Code Chapter 951 imposes strict liability only for injury to the owners of the land on to which the horse escaped. Such liability does not extend to persons who do not own the property. On the claim of negligence, the appellate court reversed the trial court, holding that sufficient issues of fact remained as to whether the horse owner was negligent in failing to insure that the horse was properly supervised or fenced in. The evidence showed that the pasture was fenced only with a split rail fence, that the fence was often damaged and that the horse had often escaped. The appellate court also reversed on the issue of liability of the trust for negligence. The trial court had granted summary judgment to the trust as an out-of-possession landlord. The appellate court held that the trust remained liable for any condition on the
land at the time of the execution of the lease, where the condition contributed to the injury. The court held that sufficient issues of fact remained as to the condition of the fence. The trial court also granted summary judgment on the basis that the plaintiff assumed the risk of injury from the horse. The appellate court reversed this ruling, holding that, under Ohio Code § 951.11, a person finding a trespassing animal may “take and confine” the animal. The court also noted that sufficient issues of fact remained as to whether the plaintiff assumed a known risk. White v. Elias, 2012 Ohio App. LEXIS 3373 (Ohio Ct. App. 2012).

## BANKRUPTCY

### GENERAL

**EXEMPTIONS.**

EARNED INCOME TAX CREDIT. On March 16, 2012, the debtors received state and federal income tax refunds for 2011 of $9,830 which included $6,104 in state and federal earned income tax credits. The refunds were automatically deposited in the debtors’ bank account which already had some funds in it. On March 19, 2012, the debtors withdrew $9300 and deposited $4000 in a separate bank account. The debtors filed for Chapter 7 on April 26, 2012 and claimed the entire amount left in the first bank account as exempt. The issue was whether and how much of the remaining funds in the first account were eligible for the exemption as an earned income tax credit refund. The court held that where exempt money has been commingled with non-exempt money, the entire amount is no longer clearly exempt. The debtors argued that they segregated the EIC funds by placing them in a separate bank account. The court noted, however, that the funds so segregated were less than the $6,104 EIC received in the refund. Thus, the court held that the debtors failed to properly keep the EIC funds segregated in the first bank account. The court used a ratio agreed to by the parties to determine the percentage of the remaining funds in the first bank account which were exempt EIC funds. In re Ross, 2012-2 U.S. Tax Cas. (CCH) ¶ 50,552 (Bankr. S.D. Ind. 2012).

**FEDERAL TAX**

TAX COURT. The debtors, husband and wife, originally filed an appeal in the Tax Court but the husband filed a Chapter 7 bankruptcy case before the Tax Court case concluded, staying the Tax Court case. The husband’s bankruptcy case was dismissed quickly for improper filing. Two months later, the wife filed a Chapter 11 case which again stayed the Tax Court case. The husband filed a consent in that case to be bound by any determination as to claims filed by the IRS. The Bankruptcy court issued a ruling which was upheld in District Court and Court of Appeals decisions. The Bankruptcy Court then lifted the stay against the Tax Court case. The Tax Court held that debtors were barred by res judicata from relitigating the matters litigated in the Bankruptcy Court case. Bilzerian v. Comm’r, T.C. Memo. 2012-264.

## CONTRACTS

**MITIGATION.** The plaintiff was a soybean farmer who hired the defendant to spray herbicide on the plaintiff’s soybean fields. After the spraying was done, the plaintiff inspected most of the fields but failed to inspect a 19 acre field until late in the season. That late season inspection showed that the 19 acre field was not sprayed because it was full of weeds. The plaintiff did not harvest the beans in that field for fear of harming the machinery and because the yield was so low. Instead the plaintiff sued the defendant for breach of contract for failing to spray the 19 acre field. The trial court ruled that a contract existed and that the defendant had breached the contract; however, the trial court found equal fault for each party and awarded the plaintiff only one-half of the damages, calculated as the value of the soybeans lost, based on the expected yield, less the costs of harvest. The appellate court found that the trial court had sufficient evidence to support the contract based on the history of the business relationship between the parties. The appellate court also upheld the trial court’s finding that the defendant breached the contract, based on sufficient evidence that the weeds exceeded the amount expected after a proper spraying. Finally, the appellate court upheld the calculation of damages, noting that the plaintiff had some responsibility for the losses because of the failure to timely inspect the field; therefore, the damages were borne equally by both parties. Baird v. Crop Production Services, Inc., 2012 Ohio App. LEXIS 3522 (Ohio Ct. App. 2012).

## FEDERAL FARM PROGRAMS

**NO ITEMS.**

## FEDERAL ESTATE AND GIFT TAXATION

**ALTERNATE VALUATION DATE.** The decedent’s estate representative hired an attorney to help administer the estate and the attorney hired a CPA to prepare the estate tax return. Neither the attorney nor the CPA advised the estate representative about the availability of the alternate valuation date election and the estate’s timely filed return did not make the election. The IRS granted the estate an extension of time to make the alternate valuation date election. Ltr. Rul. 201236002, May 30, 2012.

**LIFE INSURANCE.** The taxpayer created two trusts, one an irrevocable trust with the taxpayer as beneficiary. During the life of the taxpayer, the trustee has the discretion to distribute trust assets to the taxpayer and the taxpayer’s descendents for their support,
maintenance, health, and education in a reasonable standard of living. The trust will terminate upon the death of the taxpayer and the remaining trust assets are to be distributed to the taxpayer’s descendants. This trust owned a life insurance policy on the life of the taxpayer. The taxpayer created a second irrevocable trust for the benefit of the taxpayer’s descendants. The taxpayer contributed sufficient funds to the second trust to purchase the life insurance policy from the first trust at fair market value. The IRS ruled (1) the life insurance policy would not be included in the taxpayer’s estate, (2) under I.R.C. § 101(a)(1), the proceeds from the life insurance contract payable by the reason of the taxpayer’s death would not be included in the gross income of the second trust, and (3) the taxpayer did not have sufficient incidents of ownership in the policy because of the taxpayer’s power to substitute other property of equal value for the insurance policy. The IRS refused to rule on the issue as to whether the second trust was a grantor trust owned by the taxpayer because it was unclear whether the taxpayer had unrestricted power under state law to substitute property of equal value for the insurance policy. Ltr. Rul. 201235006, Feb. 27, 2012.

FEDERAL INCOME TAXATION

ALIMONY. In 2003, the taxpayer and former spouse separated and entered into a separation agreement which provided for monthly payments by the former spouse for six years. The payments were to be reduced when each of their three children left for college or no longer resided with the taxpayer. The couple were divorced later in 2003 and the separation agreement was incorporated into the divorce decree. There was no provision for termination of the monthly payments upon the death of the taxpayer. The agreement contained language that no child support was included because such was support was calculated into the monthly payments to the taxpayer. The taxpayer did not include any of the payments as taxable alimony income. The IRS assessed a deficiency based on treatment as taxable alimony of the minimum the taxpayer received once the three children left home. The court noted that, although the agreement said nothing about termination of payments on the death of the taxpayer, Ohio law provides for termination of such payments on the death of the taxpayer. Therefore, the court held that the non-reducible portion of the payments was taxable alimony. Schilling v. Comm’r, T.C. Memo. 2012-256.

CAPITAL ASSETS. The IRS has issued proposed regulations on allocating costs to certain property produced by a taxpayer or acquired by a taxpayer for resale. The proposed regulations affect taxpayers that are producers or resellers of property that are required to capitalize certain costs to the property and that allocate costs under the simplified production method or the simplified resale method. The proposed regulations provide rules for the treatment of negative additional costs. I.R.C. § 263A requires taxpayers to capitalize the direct costs and indirect costs that are properly allocable to: (1) real or tangible personal property the taxpayer produces, and (2) real property and personal property described in I.R.C. § 1221(a)(1) that the taxpayer acquires for resale. Treas. Reg. § 1.263A-1(f)(1) authorizes taxpayers to use the simplified methods provided in Treas. Reg. § 1.263A-2(b) (the simplified production method) or Treas. Reg. § 1.263A-3(d) (the simplified resale method) to allocate costs to eligible property produced or eligible property acquired for resale in lieu of a facts-and-circumstances allocation method. Under the simplified production method, a taxpayer must allocate additional I.R.C. § 263A costs to produced property on hand at the end of the taxable year based on the ratio of these costs incurred during the year to the taxpayer’s total I.R.C. § 471 costs incurred during the year (the absorption ratio). A negative amount generally occurs when a taxpayer capitalizes a cost as a I.R.C. § 471 cost in an amount that is greater than the amount required to be capitalized for tax purposes. To reduce the distortions that occur by including negative amounts under the simplified methods, the proposed regulations provide that, subject to certain exceptions described later in the preamble, taxpayers may not include negative amounts in additional I.R.C. § 263A costs. 77 Fed. Reg. 54482 (Sept. 5, 2012).

CHARITABLE DEDUCTION. The taxpayers, husband and wife, purchased a residence in Washington, DC with another couple as tenants in common. The taxpayers owned 12 percent of the property. The taxpayers and co-owners transferred a facade easement to a charitable organization. The property was already subject to preservation acts and the easement restrictions were similar to the preservation acts’ restrictions on changes to the property. The taxpayers obtained an easement appraisal which based the value of the easement, and the reduction in value of the property, on the estimate of an article by an IRS agent that facade easements reduce the value of properties by 10 to 15 percent. The appraisal estimated that the reduction in value was 11 percent. The IRS denied the charitable deduction and the court held that the burden of proof lay with the taxpayers. Because the appraisal did not provide sufficient evidence in the specific property of the change of value from the easement, the court held that the taxpayer failed to rebut the IRS determination that the easement did not change the value of the property, especially given that the property was already subject to substantial restrictions when it was purchased. Foster v. Comm’r, T.C. Summary Op. 2012-90.

COURT AWARDS AND SETTLEMENTS. The taxpayer sued a state agency for race discrimination in termination of employment. A jury awarded the taxpayer back pay, and front pay. The judgment was submitted to another state agency for payment and that agency withheld and paid taxes and other deductions which would normally have been withheld from wages. The District Court held that the withholding was improper because the state failed to provide statutory authority for the withholding. the District Court ordered the state to pay the taxpayer the amounts improperly withheld, even though the state had submitted those withheld amounts as payment.
of employment taxes. On appeal the appellate court reversed, holding that the judgment award was a substitute for wages, given that the award was for back and front pay. The appellate court also held that substantial authority existed that withholding taxes were required for payment of wages; therefore, the state was within its authority to withhold and pay the estimated taxes from the award. Although the court acknowledged that the state could have handled the award payment and deductions better by advising the taxpayer’s counsel of the intended withholding, the court held that the forcing of the state to repay amounts already withheld and paid for the taxpayer’s benefit amounted to a double award. **Noel v. New York Office of Mental Health Central New York Psychiatric Center, 2012-2 U.S. Tax Cas. (CCH) ¶ 50,545 (2d Cir. 2012).**

**DISASTER LOSSES.** On August 20, 2012, the President determined that certain areas in Ohio are eligible for assistance from the government under the Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5121) as a result of severe storms which began on June 29, 2012. **FEMA-4077-DR.** On August 22, 2012, the President determined that certain areas in Oklahoma are eligible for assistance from the government under the Act as a result of the Freedom Wildfire which began on August 3, 2012. **FEMA-4078-DR.** On August 24, 2012, the President determined that certain areas in New Mexico are eligible for assistance from the government under the Act as a result of flooding which began on June 22, 2012. **FEMA-4079-DR.** Accordingly, taxpayers in the areas may deduct the losses on their 2011 federal income tax returns. See I.R.C. § 165(i).

**HOBBY LOSSES.** After the taxpayer won a large lottery prize, the taxpayer purchased a building in which the taxpayer offered reflexology services and mortgage loan services. The taxpayer created an S corporation to operate the activities but the corporation did not file Form 1120S. The activities produced little revenue, mostly because the taxpayer rarely charged for the services and did not obtain any mortgage business. The taxpayer claimed tax losses from the activities which were denied by the IRS. The court held that the activities were not engaged in with the intent to make a profit because (1) the taxpayer did not keep separate and accurate books of the revenues and expenses of the activities, (2) the taxpayer had no business plan for the activities, and (3) the activities had little revenue and were only sporadically offered. **Benson v. Comm'r, T.C. Summary Op. 2012-87.**

**INNOCENT SPOUSE RELIEF.** The taxpayer and decedent had filed a joint tax return for 2007 which showed wage income for the decedent, pass-through income from an entity owned in part by the decedent, and business income for the taxpayer from two sole proprietorships. The taxpayer sought innocent spouse relief from the taxes owed for that year; however, the taxpayer testified that the taxpayer signed the 2007 return without reviewing it and the evidence showed that the decedent had failed to pay taxes in several prior years. The evidence also showed that the taxpayer could afford to pay the taxes and that the taxpayer had not since complied with all tax laws, including attempts to evade tax collection by transferring property to relatives without consideration. The court held that the taxpayer was not eligible for innocent spouse relief because (1) the taxpayer failed to review the tax return, (2) the taxpayer had reason to believe that the tax would not be paid by the decedent, (3) the taxpayer would not suffer economic hardship from paying the taxes, and (4) the taxpayer had not complied with all tax laws in the subsequent years. **Hudgins v. Comm'r, T.C. Memo. 2012-260.**

The taxpayer and former spouse filed joint income tax returns which showed substantial losses from business activities run by the former spouse. Although the taxpayer signed the returns, the taxpayer testified that the returns were not reviewed by the taxpayer. Although the IRS approved of innocent spouse relief for the taxpayer, the former spouse challenged the relief. The court held that the taxpayer was entitled to innocent spouse relief because (1) the taxes resulted from the former spouse’s activities, (2) the taxpayer signed returns without reviewing them, and (3) the former spouse failed to prove that the taxpayer had any knowledge of the excessive deductions claimed from the former spouse’s business activities. **Young v. Comm'r, T.C. Memo. 2012-255.**

**LIFE INSURANCE.** The taxpayer was an attorney and obtained a life insurance policy on the taxpayer’s life. The insurance policy received dividends and over the years accumulated cash value against which the taxpayer could borrow funds to pay premiums or receive cash. The taxpayer made several loans from the policy until the loan amount exceeded the cash value, at which time the insurance policy was terminated by the insurance company. The insurance company offset the cash value against the policy loan amount. Although the insurance company issued a Form 1099-R showing the loan payment as taxable income, the taxpayer determined, after consulting with the taxpayer’s spouse who was also an attorney, that the insurance company was wrong and that the termination of the insurance policy debt was not taxable income. The court held that, under I.R.C. § 72(e)(5), the portion of the cash value used to offset the policy loan that exceeded the taxpayer’s investment in the policy was taxable income to the taxpayer. The appellate court affirmed. **Brown v. Comm'r, 2012-2 U.S. Tax Cas. (CCH) ¶ 50,555 (7th Cir. 2012), aff’d, T.C. Memo. 2011-83.**

**PARTNERSHIPS**

**SMALL PARTNERSHIP EXCEPTION.** In a Chief Counsel Advice letter, the IRS did not provide any specific facts for the ruling but it appears that a husband and wife filed Form 1065 for a partnership in which they owned an interest as tenants by the entirety, with another partner which was a pass-through entity. The ruling states:” As the entity filed Forms 1065 for the relevant tax periods, regardless of whether the entity was a partnership, the TEFRA partnership procedures are applicable UNLESS: the small partnership exception of section 6231(a)(1) (B) is applicable; or, the returns were filed for the sole purpose of making a section 761(a) election. Treas. Reg. § 301.6233-1.”

“It is our understanding that the entity did NOT file the subject Forms 1065 to make a section 761(a) election.”
PASSIVE ACTIVITY LOSSES. The taxpayers, husband and wife, were each full time civilian employees of the U.S. Navy. The taxpayers owned one residential property and the husband owned one-third of an LLC which owned several rental properties. The taxpayers reported losses from the single property and the husband’s share of the LLC losses. The taxpayers presented written logs prepared as part of a tax audit to show the number of hours spent on the real estate activity. The court held that the taxpayers could include the hours spent on the LLC activities by the husband because the husband participated in the management of the LLC. However, the court held that the losses were passive losses because the taxpayers did not spend more than one-half of their time on the real estate activities. In addition, the taxpayers were not entitled to the I.R.C. § 469(i) deduction for up to $25,000 in passive losses because the taxpayers’ adjusted gross income exceeded $150,000. Chambers v. Comm’r, T.C. Summary Op. 2012-91.

REIMBURSEMENT PLANS. The IRS has issued a revenue ruling which provides guidance for employers under I.R.C. § 62(c) and the applicable regulations. The ruling clarifies that an arrangement that recharacterizes taxable wages as nontaxable reimbursements or allowances does not satisfy the business connection requirement of the accountable plan rules under I.R.C. § 62(c) and the applicable regulations. The ruling includes four examples, with three of the situations illustrating arrangements that impermissibly recharacterize wages, such that the arrangements are not accountable plans. The fourth example illustrates an arrangement that does not impermissibly recharacterize wages, where an employer prospectively alters its compensation structure to include a reimbursement arrangement. Generally, wage recharacterization is present when the employer structures compensation so that the employee receives the same or a substantially similar amount whether or not the employee has incurred deductible business expenses related to the employer’s business. Wage recharacterization may occur in different situations. For example, an employer recharacterizes wages if it temporarily reduces taxable wages, substituting the reduction in wages with a payment that is treated as a nontaxable reimbursement and then, after total expenses have been reimbursed, increases taxable wages to the prior wage level. Similarly, an employer recharacterizes wages if it pays a higher amount as wages to an employee only when the employee does not receive an amount treated as nontaxable reimbursement and pays a lower amount as wages to an employee only when the employee also receives an amount treated as nontaxable reimbursement. An employer also recharacterizes wages if it routinely pays an amount treated as a nontaxable reimbursement to an employee who has not incurred bona fide business expenses. However, the ruling provides that wage recharacterization does not occur where an employer does not alter existing wages but adds an employee reimbursement plan under which employees who actually incur expenses in their employment receive reimbursement for proven employee costs. Rev. Rul. 2012-25, 2012-2 C.B. 337.


RETURNS. The IRS has announced that it has extended return-filing and payment deadlines for victims of Hurricane Isaac, beginning on August 26, 2012, in parts of Louisiana and Mississippi. The tax relief postpones various tax filing and payment deadlines that occur on or after August 26, 2012. Individuals and businesses have until January 11, 2013, to file these returns and pay any taxes due. The extension also includes corporations and businesses that received an extension until October 15, 2012. The estimated tax payment for the third quarter of 2012, normally due on September 17, is also included in the tax relief provisions. The IRS will abate any interest, late-payment or late-filing penalty that would otherwise apply. The IRS will also waive failure-to-deposit penalties for federal employment and excise deposits normally due on or after August 26 and before September 10, if the deposits were made by September 12, 2012. The IRS filing and payment relief applies to the following localities in Louisiana: Ascension, Jefferson, Lafourche, Livingston, Orleans, Olaquemines, St. Bernard, St. Charles, St. John the Baptist and St. Tammny Parishes; and in Mississippi: Hancock, Harrison, Jackson and Pearl Counties. Other locations may be added in the coming days based on additional damage assessments by the Federal Emergency Management Agency. IR-2012-70.

S CORPORATIONS
SECOND CLASS OF STOCK. The taxpayer was an S corporation which made disproportionate allocations of income and disproportionate distributions to its shareholders. The taxpayer represented that under state law, all of the taxpayer’s stock have identical rights to distribution and liquidation.
proceeds and that no provision in the taxpayer’s articles of incorporation, bylaws, or any other governing instruments altered those rights. The taxpayer further represented that there was no agreement, written or oral, that any shareholder would be entitled to a preference regarding the taxpayer’s distribution or liquidation proceeds. The taxpayer agreed to make adjusted distributions to rectify the disproportionate distributions. The IRS ruled that the taxpayer did not create a second class of stock with the disproportionate distributions. Ltr. Rul. 201236003, April 11, 2012.

SOCIAL SECURITY TAXES. As part of pre-bankruptcy and post-bankruptcy petition efforts at reorganization, the taxpayer, an operator of agricultural products retail stores, closed stores and laid-off employees. The employees received severance payments from which FICA taxes were withheld. The taxpayer sought a refund of the FICA taxes withheld and paid, arguing that the severance payments were not wages. The court held that the exemption provided by I.R.C. § 3402(o)(2) for supplemental unemployment compensation benefits applied to the severance payments to exempt them from FICA taxes, the appellate court affirmed in a decision designated as not for publication. In re Quality Stores, Inc., 2012-2 U.S. Tax Cas. (CCH) ¶ 50,551 (6th Cir. 2012), aff’g, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,250 (W.D. Mich. 2010).

START-UP EXPENSES. After the taxpayer retired from employment, the taxpayer purchased a rental property in 2007 with the intent to purchase at least 10 more similar properties. The property required substantial renovations which were not completed until 2009 when the property was rented. No other properties were purchased during these years. The court acknowledged that the taxpayer properly substantiated the expenses incurred with the property but held that the expenses were not currently deductible in 2007 because the taxpayer had not established a real estate trade or business. Instead the expenses were non-deductible start-up expenses required to be capitalized in the rental property basis. McPartland v. Comm’r, T.C. Summary Op. 2012-88.

TAX COURT. The IRS sent a notice of deficiency to the taxpayer on April 8, 2011. July 7, 2011 was the date 90 days later. The taxpayer sent an appeal petition to the Tax Court on July 7, 2011 by Federal Express, “Express Saver Third Business Day.” The Tax Court received the petition on July 12, 2011. The Tax Court acknowledged that if a petition is received by the Court after the expiration of the 90-day period, it is deemed to be timely filed if the date of the U.S. Postal Service postmark stamped on the envelope in which the petition was mailed is within the time prescribed for filing. See Treas. Reg. § 301.7502-1. In Notice 2004-83, 2004-2 C.B. 1030, the IRS provided the list of companies and classes of delivery service that constitute designated private delivery services for purposes of I.R.C. § 7502 which could be substituted for the USPS. The list of designated private delivery services included FedEx Priority Overnight, FedEx Standard Overnight, FedEx 2 Day, FedEx International Priority, and FedEx International First. The Notice 2004-83 expressly states that FedEx is not designated with respect to any type of delivery service not expressly identified. Thus, the court held that “Express Saver Third Business Day” service is not a designated private delivery service and the mailing rule of Treas. Reg. § 301.7502-1 did not apply to make the petition timely filed. The court noted that the taxpayer still held a judicial recourse by paying the tax, filing for a refund, and petitioning the Federal Court of Claims if the refund is denied. Scaggs v. Comm’r, T.C. Memo. 2012-258.

**NUISANCE**

RIGHT-TO-FARM. The defendant purchased a bean and corn crop farm in 2005 and in 2006 added a hog livestock confinement operation which was permitted by the state to operate a 2800 head sow unit on the property. The plaintiffs were neighboring property owners who purchased their properties prior to the addition of the hog operation and who brought an action in nuisance, alleging loss of enjoyment of their properties because of the odors and flies from the operation. The defendant raise the defense that the Indiana Right-to-Farm Act, Ind. Code § 32-30-6-6, prohibited the nuisance action. The plaintiffs argued that the change to the hog operation was either a new agricultural operation or was a significant change in the agricultural operation, two exceptions under the statute. The court held that, because the defendant purchased an existing crop farm, the property met the requirement that the operation be in existence for more than one year. Under Ind. Code § 32-30-6-6(d)(1)(A), the court held that the statute specifically states that the change from one type of agricultural operation to another type of agricultural operation was not a significant change in the operation. The plaintiffs also argued that the defendant negligently operated the hog operation so as to cause the nuisance odors. The court acknowledged a negligence exception to the right-to-farm statute, but held that the plaintiffs failed to provide evidence that any of the defendant’s negligence caused the nuisance odors. Dalzell v. Country View Family Farms, LLC, 2012 U.S. Dist. LEXIS 130773 (S.D. Ind. 2012).

**IN THE NEWS**

SALE OF ESTATE PROPERTY IN CHAPTER 12. Senators Grassley and Franken have introduced S. 3545. “A bill to amend title 11 of the United States Code to clarify the rule allowing discharge as a nonpriority claim of governmental claims arising from the disposition of farm assets under chapter 12 bankruptcies; referred to the Committee on Finance.” Congressional Record, S6339, Sept. 13, 2012.
The Agricultural Law Press is honored to publish the completely revised and updated 16th Edition of Dr. Neil E. Harl’s excellent guide for farmers and ranchers who want to make the most of the state and federal income and estate tax laws to assure the least expensive and most efficient transfer of their estates to their children and heirs. This book contains detailed advice on assuring worry-free retirement years, using wills, trusts, insurance and outside investments as estate planning tools, ways to save on estate settlement costs, and an approach to setting up a plan that will eliminate arguments and friction in the family. Federal estate taxation has undergone great changes in recent years and this book sorts out these changes for you in a concise manner. FEBP also includes discussion of employment taxes, formation and advantages of use of business entities, federal farm payments, state laws on corporate ownership of farm land, federal gift tax law, annuities, installment obligations, charitable deductions, all with an eye to the least expensive and most efficient transfer of the farm to heirs.

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