



## **Eighth Circuit Reverses - CRP Rents Paid To A Non-Farmer Are Not Subject to Self-Employment Tax**

2321 N. Loop Drive, Ste 200 • Ames, Iowa 50010

[www.calt.iastate.edu](http://www.calt.iastate.edu)

June 20, 2013

Updated October 10, 2014

- by Roger A. McEowen\*

### **Overview**

Since the late 1980s, the IRS and the courts have issued various rulings, advices, notices and opinions concerning the issue of whether Conservation Reserve Program (CRP) payments are subject to self-employment tax. Until 2003, the IRS always took the position that a taxpayer had to be materially participating in a farming operation for CRP payments to be subject to self-employment tax. The courts agreed. But, in 2003, the IRS took the position in a Chief Counsel Advice that the mere signing of a CRP contract resulted in the signing taxpayer being engaged in the trade or business of farming with the result that the CRP payments were subject to self-employment tax.<sup>1</sup>

In 2013, the U.S. Tax Court agreed with the IRS.<sup>2</sup> The implications of the court's decision could be far reaching by subjecting mere passive investors in farmland and non-farming heirs to self-employment tax on CRP rental income. But, on October 10, 2014, the U.S. Court of Appeals for the Eighth Circuit reversed and held that, at least for CRP payments paid before 2008, they are not subject to self-employment tax in the hands of a non-farmer.<sup>3</sup> While the decision is fairly narrow in scope, there is language in the opinion that can be helpful, at least in the Eighth Circuit, in arguing that

CRP payments should not be subject to self-employment tax for taxpayers that aren't materially participating in a farming business.

### **IRS Notice of Proposed Rulemaking**

On December 5, 2006, the Internal Revenue Service (IRS) issued a Notice of proposed revenue ruling concerning the self-employment tax treatment of Conservation Reserve Program (CRP) payments.<sup>4</sup> The primary purpose of the *Notice* was to address the question of whether CRP payments are subject to self-employment tax if the taxpayer is retired or not otherwise actively engaged in agriculture. The *Notice* concludes that participation in the CRP, absent the taxpayer's participation in a farming operation, constitutes a trade or business because the CRP itself meets the criteria to be a trade or business based on the activities required directly under the program – including seeding a cover crop and maintaining weed control. Thus, CRP rental payments are subject to self-employment tax regardless of whether the recipient is engaged in a farming business on non-CRP land. However, the *Notice* states that any amounts received as a cost-share payment for participation in the CRP that are excludible from income under I.R.C. §126 are not subject to self-employment tax.

**Note:** The IRS never published a Revenue Ruling. All comments that IRS received on the matter disagreed with their position on the matter.

**Primary basis for the IRS' position.** The primary authority for the IRS' position is *Announcement 83-43*<sup>5</sup>, an Announcement that pre-dates the existence of the CRP. In the Announcement, IRS took the position that participation in the payment-in-kind (PIK) program (or any other land diversion program) does not cause the enrolled land to cease to be treated as land used in the active conduct of a farming business for purposes of I.R.C. §2032A (special-use valuation) and I.R.C. §6166 (installment payment of federal estate tax). IRS stated that this would also be the result if a taxpayer's entire farm were devoted to conservation use under the program. The impact of the ruling is that a decedent's estate containing PIK-enrolled land remained eligible for special use valuation (because the decedent still met the qualified use test with respect to the enrolled land) as well as the ability to pay any resulting estate tax in installments (for the same reason).

Likewise, if an heir were to enroll land in the PIK, that would also not trigger recapture or acceleration of federal estate tax. On the other hand, the Announcement states that the cash rental amount received by a *farmer* for participation in the PIK is subject to self-employment tax. The Announcement, however, is silent on the question of whether PIK payments received by a non-farmer (investor) or retired farmer would be subject to self-employment tax.

**Subsequent IRS rulings.** The IRS has applied the principles of *Announcement 83-43* in several rulings. In *Priv. Ltr. Rul. 8729037*<sup>6</sup> the first IRS ruling issued after the creation of the CRP in the 1985 Farm Bill,

IRS ruled that the CRP is similar to the PIK program and that a qualified heir's participation in the CRP would not trigger recapture of estate tax under I.R.C. §2032A for failure to use the elected land as a farm for farming purposes. Of course, to elect special-use valuation in a decedent's estate the decedent must have been using the land for farming purposes for a specified period of time before death and the qualified heir(s) must continue the farm use for 10 years after the decedent's death. The ruling provides no guidance on the question of whether a taxpayer that is either retired from farming or has never been a farmer is converted into the status of a farmer by virtue of enrollment of land into the CRP.

Again, in *Priv. Ltr. Rul. 8745016*,<sup>7</sup> IRS ruled (based on *Announcement 83-43*) that a qualified heir's participation in the CRP does not trigger recapture of federal estate tax under I.R.C. §2032A for failure to use the land as a farm for farming purposes. In *Priv. Ltr. Rul. 8802026*,<sup>8</sup> IRS again ruled that a qualified heir's participation in the CRP does not trigger recapture of federal estate tax under I.R.C. §2032A for failure to use the land as a farm for farming purposes.

More squarely on point, in *Priv. Ltr. Rul. 8822064*,<sup>9</sup> IRS ruled that CRP payments are to be considered receipts from farming operations rather than rents from real estate (which would be excluded from self-employment tax by virtue of I.R.C. §1402(a)(1)). However, IRS noted in the ruling that the taxpayer (who was 71 years old and had been personally farming the land during the year immediately before enrolling the land in the CRP) was retired from farming. As such, IRS ruled that the CRP payments were not subject to self-employment tax. The IRS referenced *Rev. Rul. 68-44*,<sup>10</sup> *Rev. Rul. 65-149*,<sup>11</sup> and *Rev. Rul. 60-32*,<sup>12</sup> to bolster its position. In those

rulings, IRS stated that annual payments under farm programs comparable to the CRP are in the nature of farm receipts from farm operations and are not rental payments. But, IRS stated in the rulings that such payments are *not* subject to self-employment tax if the taxpayer was not materially participating in farming operations (either personally or via a lease) on land not in the government land diversion program.

*Tech. Adv. Memo. 9212001*,<sup>13</sup> involved facts where a taxpayer, who was engaged in the active trade or business of farming, purchased land previously enrolled in the CRP. The taxpayer subsequently died while still engaged in the trade or business of farming on the non-CRP land. The question was whether the CRP land constituted a closely-held business interest for purposes of an I.R.C. §6166 election (installment payment of federal estate tax) in the taxpayer's estate. The IRS ruled that the CRP land did constitute an interest in a closely-held business for purposes of I.R.C. §6166 because it was part of the taxpayer's trade or business of farming along with the other property used by the taxpayer (before death) in the trade or business of farming.

The ruling is silent as to whether such CRP land would constitute an interest in the trade or business of farming if the taxpayer was *not* engaged in the trade or business of farming by virtue of being retired or a passive investor in farmland.

## Court Rulings

**The “trade or business” issue.** The courts have consistently upheld the IRS position in the rulings that rental payments (either within the context of the CRP or without) are subject to self-employment tax in the hands of a taxpayer *who is engaged in a*

*trade or business and the rental payments relate to that business.* Conversely, the courts have ruled that if the taxpayer is not engaged in a trade or business, rental payments, by themselves, are insufficient to constitute a trade or business resulting in the payments being subject to self-employment tax.

I.R.C. §1402(a)(1) excepts “rents from real estate” from the definition of “net earnings from self-employment.” In *Priv. Ltr. Rul. 8822064*,<sup>14</sup> IRS ruled that CRP rental payments are receipts from farming operations rather than rents from real estate. Thus, they are not excluded from self-employment tax by virtue of the statutory exception under I.R.C. §1402(a)(1). This position was supported by the United States Court of Appeals for the Sixth Circuit in *Wuebker v. Comr.*<sup>15</sup> The court held that the services required under the CRP contract were substantial enough to classify the payments as “services rendered to the occupant” within the meaning of Treas. Reg. §1.1402(a)-4(c)(2). Thus, the CRP payments were not excluded from self-employment tax by virtue of being “rental payments.” Because the taxpayers in *Wuebker* conducted farming operations on non-CRP land the court, consistent with prior IRS rulings held that the CRP payments were subject to self-employment tax due to the “nexus” with the taxpayer's existing farming operation. The court's opinion followed the rationale of *Ray v. Comr.*,<sup>16</sup> in which the court ruled that the self-employment tax treatment of CRP payments was dependent on a “direct nexus” to an existing farming operation the taxpayer conducted.

**Note:** The court in *Wuebker* did *not* state that CRP payments are subject to self-employment tax in the hands of a retired farmer or an investor in CRP land. The court was not faced with

that issue.

In the agricultural context, other courts have similarly required a taxpayer to be materially participating in a farming trade or business (either personally, via agent or through a lease) for other income to be subject to self-employment tax. That was the case in *Henderson v. Flemming*,<sup>17</sup> *McNamara v. Comr.*,<sup>18</sup> and *Bot v. Comr.*,<sup>19</sup> Conversely, in *Dugan v. Comr.*,<sup>20</sup> a taxpayer was held to not be liable for self-employment tax on income from share-farming operations conducted with a friend where the taxpayer did not materially participate in farming operations and permitted the friend (as tenant) to make all of the decisions concerning the farming activity. Importantly, the contract (lease agreement) between the landlord and the tenant was insufficient, by itself, to subject the lease payments as being subject to self-employment tax in the landlord's hands. Instead, an examination of the facts was necessary to determine whether the taxpayer was engaged in a trade or business that resulted in the payments being subject to self-employment tax. That approach is consistent with the U.S. Supreme Court's opinion in *Groetzinger v. Comr.*<sup>21</sup> In that case, the Court noted that whether a taxpayer is engaged in a trade or business requires a factual determination in every case.

**Note:** Until the Tax Court's opinion in *Morehouse* on June 18, 2013, there was no reported court opinion holding that the mere signing of a CRP contract caused the taxpayer to be engaged in a trade or business. That question can only be answered by examining the terms of the contract (or lease) and whether the taxpayer is an active farmer.

**Deducting expenses.** *Hasbrouck v. Comr.*,<sup>22</sup> involved a situation where the taxpayers had never been engaged in the trade or business of farming, but purchased CRP land. The taxpayers signed a CRP contract to continue enrollment of the land in the CRP, and USDA determined that the taxpayers were actively engaged in farming. Based on that determination, the taxpayers filed a Schedule F containing net losses after reporting the CRP income and deducting farming expenses. The IRS disallowed the loss on the basis that the taxpayer's were *not* actively engaged in the trade or business of farming during the tax year in issue. The court held that the IRS's position was substantially justified. Again, consistent with prior IRS rulings and court opinions, the IRS took the position that the CRP contract, by itself, was insufficient to deem the taxpayer as being in the trade or business of farming. As expected, the court upheld the IRS's position as being substantially justified.

### **The 2003 IRS Ruling and the 2006 Notice**

In *CCA Ltr. Rul. 200325002*<sup>23</sup> the Chief Counsel's office of IRS took the position for the first time that CRP payments are subject to self-employment tax regardless of whether the taxpayer is actively conducting a farming operation on non- CRP land. The IRS took this position without the support of any court cases. As illustrated above, the courts and the IRS have always determined whether a taxpayer is engaged in a trade or business based on the facts of each particular situation presented. That approach is consistent with long-standing precedence, including the U.S. Supreme Court's opinion in *Groetzinger*. The 2006 IRS Notice<sup>24</sup> essentially restates the position of the Chief Counsel's office as stated in the 2003 ruling.

### ***Morehouse v. Comr.***<sup>25</sup>

On June 18, 2013, the U.S. Tax Court released its opinion in *Morehouse v. Comr.*<sup>26</sup> The facts of the case are fairly straightforward. The petitioner was a non-farmer that lived in Texas and worked for the University of Texas. In 1994, he inherited farmland in South Dakota and bought other farmland from his family members. He never personally farmed the land, but rented it out. In 1997, he put the bulk of the property in the CRP while continuing to rent-out the non-CRP land. He hired a local farmer to maintain the CRP land consistent with the CRP contract (e.g., plant a cover crop and maintain weed control). In 2003, the petitioner moved to Minnesota, but still never personally engaged in farming activities. Consequently, the petitioner reported his CRP income on Schedule E where it was not subject to self-employment tax.

**Note:** The Congress included a provision in the 2008 Farm Bill specifying that CRP payments are not subject to self-employment tax if the recipient is also receiving Social Security retirement or disability payments. The provision is applicable for payments made after December 31, 2007. The tax years at issue in the case were 2006 and 2007. Thus, the statutory provision was inapplicable. In any event, the Tax Court noted that the congressional change was very narrow and that the Congress did not intend to exclude CRP payments from self-employment tax in their entirety.<sup>27</sup>

The Tax Court, in breaking with its own past precedent, ruled in favor of the IRS. The court determined that the petitioner was in the business of participating in the CRP with the intent to make a profit. The court

skipped entirely over the material participation requirement and determined the existence of a trade or business on either the petitioner's personal involvement with the CRP contract<sup>28</sup> or through the local farmer that he hired to maintain the land. The court cited the Sixth Circuit's decision in *Wuebker*<sup>29</sup> as controlling even though the taxpayer in that case was an active farmer and the petitioner in this case was a mere investor that had never been engaged in farming. Thus, *Wuebker* was factually distinguishable. However, the court stated that the petitioner was in the business of maintaining "an environmentally friendly farming operation."

**Note:** Had the petitioner cash rented the farmland instead of putting it in the CRP the rental income would have been reported on Schedule E and would not have been subject to self-employment tax.

### **Contrary to Tax Court's Own Precedent**

The Tax Court's opinion in *Morehouse* is contrary to the court's prior opinions on the trade or business issue.

While, as the Tax Court ruled in *Morehouse*, CRP payments may not constitute "rents from real estate" such that they are exempt from self-employment tax under the exception of I.R.C. §1402(a)(1), that determination has no bearing on the issue of whether the taxpayer is engaged in a trade or business as required by I.R.C. §1402(a). That question can only be answered by examining the facts pertinent to a particular taxpayer. Mere signing of a CRP contract and satisfying the contract terms via an agent is insufficient to answer that question. The Tax Court had already answered that question in *Dugan*.<sup>30</sup> As noted above, that case (which also involved a South Dakota set of facts) *stands for the proposition that*

*the contract (lease agreement) between the landlord and the tenant is insufficient, by itself, to subject the lease payments to self-employment tax in the landlord's hands.*

**Note:** The Tax Court did not refer to its prior opinion in *Dugan*.

The court also made no mention of its prior opinion in *Vianello v. Comr.*<sup>31</sup> which would appear to be directly on point on the trade or business issue. In *Vianello*, the taxpayer was a CPA that, during the years in issue, operated an accounting firm in the Kansas City area. In 2001, the petitioner acquired 200 acres of cropland and pasture in southwest Missouri approximately 150 miles from his office. At the time of the acquisition, a tenant (pursuant to an oral lease with the prior owner) had planted the cropland to soybeans. Under the lease, the tenant would deduct the cost of chemicals and fertilizer from total sale proceeds of the bean and pay the landlord one third of the amount of the sale. The petitioner never personally met the tenant during the years at issue, but the parties did agree via telephone to continue the existing lease arrangement for 2002. Accordingly, the tenant paid the expenses associated with the 2001 and 2002 soybean crops, and provided the necessary equipment and labor. The tenant made all the decisions with respect to raising and marketing the crop, and paid the petitioner one-third of the net proceeds. As for the pasture, the tenant mowed it and maintained the fences. Ultimately, a disagreement between the petitioner and the tenant resulted in the lease being terminated in early 2003, and the petitioner had another party plow under the fall-planted wheat in the spring of 2004 prior to the planting of Bermuda grass. Also, the petitioner bought two tractors in 2002 and a third tractor and hay equipment in 2003, and bought another 50 acres from in late 2003.

The petitioner did not report any Schedule F income for 2002 or 2003, but did claim a Schedule F loss for each year - as a result of depreciation claimed on farm assets and other farming expenses. The petitioner concluded, based on a reading of IRS Pub. 225 (Farmer's Tax Guide) that he materially participated in the trade or business of farming for the years at issue. The petitioner claimed involvement in major management decisions, provided and maintained fences, discussed row crop alternatives, weed maintenance and Bermuda grass planting with the tenant. The petitioner also claimed he bore risk of loss under the lease because an unsuccessful harvest would mean that he would have to repay the tenant for the tenant's share of chemical cost.

The Tax Court determined that the petitioner was not engaged in the trade or business of farming for 2002 or 2003. The court noted that the tenant paid all the expenses with respect to the 2002 soybean crop, and made all of the cropping decisions. In addition, the court noted that the facts were unclear as to whether the petitioner was responsible under the lease for reimbursing the tenant for input costs in the event of an unprofitable harvest.

Importantly, the court noted that the USDA's determination that the petitioner's revocable trust satisfied the active engagement test and was a co-producer with the tenant for farm program eligibility purposes "has no bearing on whether petitioner was engaged in such a trade or business for purposes of section 162(a)...".

While the Tax Court also declined to utilize an "arrangement" analysis consistent with the approach utilized in *Mizell v. Comr.* in determining whether the petitioner was engaged in the trade or business of farming, the court did specifically note that the

Treasury Regulations under I.R.C. §1402 “make it clear that petitioner’s efforts do not constitute production or the management of the production as required to meet the material participation standard.” [emphasis added]. That is a key point. The petitioner was *not* engaged in the trade or business of farming either for deduction purposes or self-employment tax purposes.

**Note:** In *Vianello*, the Tax Court noted that the taxpayer must satisfy the material participation test for rental income to be subject to self-employment tax. That point was not addressed in *Morehouse*.

### Appeal of the Tax Court’s Opinion

The Tax Court’s opinion was appealed to the Eighth Circuit with oral argument occurring on June 11, 2014. As for possible outcome, the possibilities were that the Eighth Circuit could (1) affirm the Tax Court; (2) vacate the Tax Court decision (wipe it off the books) with instructions for the Tax Court to enter a new decision holding that passive, non-farm landowners do not owe self-employment tax on CRP payments; (3) the court could reverse the Tax Court on the basis that the Sixth Circuit’s decision in *Wuebker* was incorrectly decided; or (4) reverse the Tax Court and hold that the case is distinguishable from *Wuebker* inasmuch as *Wuebker* involved an active farmer and *Morehouse* was not a farmer.

### The Eighth Circuit’s Opinion

**Majority opinion.** On October 10, 2014, in a 2-1 opinion, the U.S. Court of Appeals for the Eighth Circuit decided *Morehouse*.<sup>32</sup> The majority chose option (4) indicated above – they reversed the Tax Court and, in

the process, distinguished the case from the Sixth Circuit’s *Wuebker* opinion.

The majority opinion, issued by Judge Beam, noted that the CRP is the current federal program in a long line of conservation programs and is similar to the old Soil Bank program – even noting that the CRP program has been referred to as the “Son of Soil Bank.” Based on that close tie, the court noted that the IRS, in *Rev. Rul. 60-32*,<sup>33</sup> said that Soil Bank payments paid to *non-farmers* were not subject to self-employment tax, but they were subject to self-employment tax if they were paid to materially participating farmers. The IRS again restated that position in *Rev. Rul. 65-149*.<sup>34</sup> The court found those rulings to be persuasive and binding on the IRS given the similarities between the CRP and the Soil Bank program. Thus, the court held that “CRP payments made to non-farmers constitute rentals from real estate for purposes of §1402(a)(1) and are excluded from the self-employment tax.”

The court also pointed out that IRS issued *Notice 2006-108*<sup>35</sup> and “with little analysis, the proposed revenue ruling concluded CRP payments to non-farmers were not rentals from real estate and should be treated as income from self-employment.” IRS said in that *Notice* that the proposed Revenue Ruling would make obsolete *Rev. Rul. 60-32*, but the IRS never formally adopted the proposed revenue ruling, and the court refused to give it any deference.

The court distinguished the Sixth Circuit’s opinion in *Wuebker*,<sup>36</sup> on the basis that the taxpayer in *Morehouse* was not a farmer and that the taxpayer in *Wuebker* was an active farmer. On that point, the court noted that the Sixth Circuit “neither recognized nor rejected the IRS’s position in *Rev. Rul. 60-32* that similar payments [i.e., Soil Bank

payments] to non-farmers were not self-employment income.”

The court also viewed the CRP payments that the taxpayer received as being for the use and occupancy of his land, noting that the CRP contract reserves the government’s right of entry on the land. The court also found it important that the IRS had represented that if the taxpayer had not fulfilled the contractual requirements, “the USDA could arrange for any needed work to complete ‘on his behalf.’ ” Similarly, the court noted that, via a CRP contract, the government is using the taxpayer’s land for the government’s own purpose of removing sensitive cropland from production and other environmental purposes for the benefit of the public. Accordingly, the court held that “the 2006 and 2007 CRP payments were “consideration paid [by the government] for use [and occupancy] of [Morehouse’s property]” and thus constituted rentals from real estate fully within the meaning of I.R.C. §1402(a)(1).”

**Note:** On this point, the court’s holding is contrary to that of the Sixth Circuit in *Wuebker*.<sup>37</sup>

**Dissenting opinion.** A dissenting judge would have followed the Sixth Circuit’s interpretation of “rents from real estate” contained in I.R.C. §1402. The dissent believed that the Tax Court did not commit clear error by finding that the taxpayer’s activity (personally and through an agent) “were sufficiently continuous and regular to carry on a trade or business.” The dissent believed the IRS position in *Notice 2006-108* was entitled to limited deference, but that such deference had to be tempered by the inconsistent views espoused by the IRS on the issue over time and the IRS’s failure to adopt a Revenue Ruling that would have rendered obsolete *Rev. Rul. 60-32*.

Ultimately, however, the dissent believed that the CRP payments received by the taxpayer were not “rentals from real estate” for purposes of the exclusion of I.R.C. §1402(a)(1) and that the majority had adopted “an almost unbounded view of occupancy” for purposes of the rental real estate exclusion.

**What does the Eighth Circuit’s opinion mean?** The bottom line is that the Eighth Circuit reversed the Tax Court and distinguished the Sixth Circuit’s *Wuebker* opinion by holding that CRP payments in the hands of a non-farmer are not subject to self-employment tax. The court also held that CRP payments at issue (paid before 2008) qualify as “rentals from real estate” because they were payments for the government’s use and occupancy of the taxpayer’s land. However, because of the statutory change to I.R.C. §1402(a)(1) by virtue of the 2008 Farm Bill, CRP payments paid after 2007 are “rentals from real estate” for taxpayers receiving Social Security or disability payments. The dissent made this point clear when it stated, “whether CRP payments that the government made after December 31, 2007 or currently makes to a non-farmer qualify as rentals from real estate under amended §1402(a)(1) is a question that the court’s decision does not resolve.” This seems to indicate that this judge views CRP payments to be “rentals from real estate” in every situation where they are paid after 2007. Thus, the differing holdings of the Eighth Circuit and the Sixth Circuit on this particular point were rendered meaningless by the 2008 amendment to I.R.C. §1402(a)(1). CRP payments paid after 2007 are “rentals from real estate.”

**Conclusion – Where Are We Now?**

The Tax Court's decision in *Morehouse* was the first court opinion holding that a non-farmer's CRP income is subject to self-employment tax simply by virtue of signing a CRP contract. That made it hard to imagine any situation where CRP rental income would *not* be subject to self-employment tax – especially in the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota).

Now, the Eighth Circuit's reversal of the Tax Court means that non-farmers do not have to pay self-employment tax on CRP payments. That's the case at least within the Eighth Circuit. Active farmers still have self-employment tax to pay on CRP payments unless the 2008 Farm Bill provision applies to them. But, non-farmers and non-materially participating farm landlords are given relief within the Eighth Circuit. For CRP rents paid after 2007, the question is whether the recipient is a materially participating farmer.<sup>38</sup> The Eighth Circuit's opinion is helpful in arguing that a non-farmer is not materially participating with respect to the CRP. The majority stated, "The record indicates that Morehouse never personally farmed the CRP Properties and that he tilled and fertilized the land so that he could establish grass covering of which he could make no economic use. We suspect, respectfully, that the Commissioner's characterization of Morehouse's activities as even remotely resembling a "farming operation" would be met with a fair modicum of skepticism by anyone who has carried on (or closely observed) such an enterprise." That's very helpful language that could even support an argument that an active farmer that has CRP ground that is, for example, located in a location distant from the actual farming operation, need not pay self-employment tax on CRP rents.

It remains to be seen whether the IRS will ask the full Eighth Circuit to review the panel's decision. IRS could also issue a non-acquiescence to the court's decision. If that is done, it would signal relatively no change in audit activity outside of the Eighth Circuit. Inside the Eighth Circuit, even though the court's opinion technically applies only to CRP rents paid before 2008, it would be difficult for IRS to argue that a non-farmer is materially participating with respect to land in the CRP. Because the court distinguished the Sixth Circuit's *Wuebker* opinion as only applying to active farmers, there is no conflict between the circuit courts on the holding that CRP payments in the hands of a non-farmer are not subject to self-employment tax. On the court's other holding that CRP payments are "rentals from real estate" because they are paid for the use and occupancy of the taxpayer's land, that contrary holding to that of the Sixth Circuit was mooted by the 2008 amendment to I.R.C. §1402(a)(1). Thus, there appears to be nothing ripe for Supreme Court review.

What is particularly refreshing is that the court did not give deference to an IRS Notice of Proposed Rulemaking. If IRS wants deference, they have to finalize a Revenue Ruling or issue a Treasury Regulation.<sup>39</sup>

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\*Leonard Dolezal Professor in Agricultural Law, Iowa State University, Ames, Iowa; Director of the Center for Agricultural Law and Taxation, Ames, Iowa. Member of the Iowa and Kansas Bar Associations and licensed to practice in Nebraska.

<sup>1</sup> CCA 200325002 (May 29, 2003).

<sup>2</sup> *Morehouse v. Comr.*, 140 T.C. No. 16 (2013).

<sup>3</sup> *Morehouse v. Comr.*, No. 13-3110, 2014 U.S. App. LEXIS 19331 (8th Cir. Oct. 10, 2014).

<sup>4</sup> IRS Notice 2006-108, I.R.B. 2006-51 (Dec. 18, 2006).

<sup>5</sup> *1983-10, I.R.B. 29.*

<sup>6</sup> Apr. 21, 1987.

<sup>7</sup> Aug. 7, 1987.

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<sup>8</sup> Oct. 14, 1987.  
<sup>9</sup> Mar. 7, 1988.  
<sup>10</sup> 1968-1 C.B. 191.  
<sup>11</sup> 1965-1 C.B. 434.  
<sup>12</sup> 1960-1 C.B. 23.  
<sup>13</sup> Jun. 20, 1991.  
<sup>14</sup> Mar. 7, 1988.  
<sup>15</sup> 205 F.3d 897 (6th Cir. 2000).  
<sup>16</sup> T.C. Memo. 1996-436.  
<sup>17</sup> 283 F.2d 882 (5th Cir. 1960).  
<sup>18</sup> 236F.3d 410 (8th Cir. 2003).  
<sup>19</sup> 353 F.3d 595 (8th Cir. 2003).  
<sup>20</sup> T.C. Memo. 1994-578.  
<sup>21</sup> 480 U.S. 23 (1987).  
<sup>22</sup> T.C. Memo. 1998-249.  
<sup>23</sup> May 29, 2003.  
<sup>24</sup> 2006-108, I.R.B. 2006-51 (Dec. 18, 2006).  
<sup>25</sup> 140 T.C. No. 16 (2013).  
<sup>26</sup> Id.  
<sup>27</sup> After the provision was enacted, Kansas Senator Pat Roberts was quoted as saying that the Congress had “fixed the statutory problem” with respect to the self-employment taxation of CRP payments for non-farmers.  
<sup>28</sup> The court noted that the CRP contract required seeding of a cover crop and maintenance of weed control, that the petitioner visited the properties on occasion to ensure that the CRP contract requirements were being satisfied, that the petitioner participated in emergency haying programs and requested cost-sharing payments, and made the decision as to whether re-enroll the properties in the CRP upon contract expiration.  
<sup>29</sup> 283 F.3d 897 (6th Cir. 2000).  
<sup>30</sup> T.C. Memo. 1994-578.  
<sup>31</sup> T.C. Memo. 2010-17.  
<sup>32</sup> *Morehouse v. Comr.*, No. 13-3110 (8th Cir. Oct. 10, 2014).  
<sup>33</sup> 1960-1 C.B. 23 (1960).  
<sup>34</sup> 1965-1 C.B. 434 (1965).  
<sup>35</sup> I.R.B. 2006-51 (Dec. 18, 2006).  
<sup>36</sup> 205 F.3d 897 (6th Cir. 2000).  
<sup>37</sup> Id.  
<sup>38</sup> An exception contained within I.R.C. §1402(a)(1)(A) eliminates the rental real estate exception for taxpayers that materially participate in a farming operation.  
<sup>39</sup> See *Swallows Holding, Ltd. v. Comr.*, 515 F.3d 162 (3d Cir. 2008)(IRS entitled to the highly deferential standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) with respect to Treasury Regulations); *Mayo Foundation for Medical Education and Research v. United States*, 131 S. Ct. 704 (2011)(same).