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LLCs and passive activity losses*

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The hybrid nature of limited liability companies (and limited liability partnerships) has contributed to uncertainty as to how the passive activity loss rules are to be applied to LLCs and LLPs as well as other hybrid-type organizational structures. Limited liability companies, in particular, have become a highly popular choice for organizing farm and ranch businesses and for holding real

estate leased to farm and ranch businesses. A 2005 Tax Court case has cast some light on how the passive activity loss rules are to be applied to such hybrid entities.

Overview of passive activity loss rules

In general, deductions from passive trade or business activities, to the extent deductions exceed income from all passive activities (exclusive of portfolio income), may not be deducted against other income. An activity is considered a passive activity if it involves the conduct of a trade or business and the taxpayer does not materially participate in the activity. A taxpayer, for this purpose, is treated as materially participating in an activity only if the person "is involved in the

operations of the activity on a basis which is regular, continuous and substantial."

The passive loss rules do not refer to limited liability companies or limited liability partnerships but do refer to limited partners in a limited partnership. Under those rules, losses attributable to limited partnership interests are treated as arising from a passive activity unless a limited partner participates for more than 500 hours, materially participated in five or more of the ten preceding years or the activity is a personal service activity in

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Handbook updates
 For those subscribing to the handbook, the following updates are included.

Farmland Value Survey (Realtors Land Institute) – C2-75 (2 pages)

Please add these files to your handbook and remove the out-of-date material.

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which the limited partner materially participated for any three preceding tax years. In general, a partnership interest (and, for tax purposes, an LLC or LLP is considered a partnership) is treated as a limited partnership interest if so designated in the organizational documents or *the liability of the holder of the interest is limited to a fixed, determinable amount under state law* such as the amount contributed to the entity. However, a general partner who holds a limited partnership interest is not necessarily treated as a limited partner.

The 2005 tax court case

In the 2005 Tax Court case, *Al Assaf v. Commissioner*, a husband and wife owned a limited liability company which in turn owned an office building with space rented to law firms. The LLC also provided extensive legal support services to the tenants – handling client intake, answering telephones, taking messages, filing documents, process serving, mailing, binding briefs, conducting legal research, typing briefs and legal memoranda, taking dictation, managing a file room and photocopying as well as other housekeeping type services. One of the 50 percent owners of the LLC, the wife, who was also an attorney, managed the legal support service enterprise. The LLC also provided consulting services to attorneys and health maintenance organizations (the other 50 percent owner of the LLC, the husband, was a medical doctor who worked full-time in a medical school).

The LLC incurred losses during the years at issue from the real estate leasing and support services activities which were used to offset gains from the consulting activity with the net losses passed through to the LLC owners. The taxpayers classified the losses as nonpassive which allowed the netting of the losses. The Internal Revenue Service took the position that the LLCs leasing activities were *per se* passive and, therefore, were limited by the passive activity rules.

The Tax Court, agreeing with the taxpayers, rejected the IRS argument that the leasing activities were *per se* passive and held that the taxpayers qualified for the “extraordinary personal services” exception under the passive activity rules for rental property. The court agreed that the taxpayers had proved that the use of the leased real property by the tenants was incidental to the receipt of the LLCs services. The temporary regulations state that extraordinary personal services are provided in connection with making property available to users “. . . only if the services provided in connection with the use of the property are performed by individuals, and the use. . . of the property is incidental to their receipt of such services.”

In addition to proving that the extraordinary personal services exception applied, the taxpayers also had to show that they had materially participated in the activity. The Tax Court found the testimony compelling that the wife’s involvement exceeded the 500 hours required in the first of the seven tests for material participation.

In conclusion

The Tax Court concluded that the LLCs activities were not passive activities, the losses were not passive and the losses could be netted with the other income of the LLC. Unless reversed on appeal, this case could be a useful template for planning in other settings where leasing occurs and extraordinary personal services are performed. The rejection of the IRS argument that the leasing activities were *per se* passive was a major development in the case.

* Reprinted with permission from the April 8, 2005 issue of *Agricultural Law Digest*, Agricultural Law Press Publications, Eugene, Oregon. Footnotes not included.

Do farm payments promote rural economic growth?

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Farm policy is once again in the news. The Administration's recently released budget called for annual cuts in federal payments to farmers of \$570 million, prompting new cries of foul and fair from various interest groups. Moreover, government spending on agriculture remains a contentious issue in the current round of global trade talks.

Developing countries call for the European Union and the United States to slash farm subsidies, supports that they claim depress farm prices for developing world growers. Finally, Brazil recently won a challenge in the World Trade Organization that payments in the U.S. cotton program unfairly harm producers in other countries.

Amid this swirl of issues, it is useful to revisit the many goals of U.S. farm policy and ask whether current programs are hitting those goals. Surprisingly, the current farm bill does not explicitly state them. However, a quick glance at the past several farm bills and the debate that surrounded their passage points to a handful of goals that persist: ensuring a high-quality, abundant food supply; supporting the incomes of farmers; maintaining the competitiveness of U.S. agriculture in global markets; and promoting rural economic growth.

The last goal has been important ever since farm policy was first crafted in the Great Depression, when one in every four Americans lived on a farm. So when farm policy boosted farm prices it also boosted the rural economy—and indeed, the U.S. economy. Today, only one in every 75 Americans lives on a farm, and just one in every 750 lives on a full-time commercial farm.

Despite dramatic changes in the farm landscape, direct payments to farmers remain the dominant feature of U.S. farm policy. For instance, the 2002 farm bill commits 69% of total spending to commodity payments to farmers, and another 13% to conservation payments to farmers. Thus, fully four-fifths of total spending goes directly to farmers. Meanwhile, only 0.7% goes to rural development initiatives. In short, the current farm bill focuses on supporting farm incomes—clearly an ongoing goal of farm policy. But the 2002 farm bill also articulates a clear commitment to the rural economy—a pledge highlighted in its title, *The Farm Security and Rural*

Investment Act. Like other farm bills before it, the current bill assumes that raising farm incomes will promote rural economic growth. Does that assumption still hold?

Where do farm payments go?

A good starting point is to consider where federal farm payments go and then examine how the economy is doing in those places. The Commerce Department's REIS dataset (Regional Economic Information System) provides a consistent set of data to draw this comparison. It contains a robust set of economic indicators and also tracks federal farm payments in terms of where they are received. That is, USDA calculates farm payments on the farm itself, even though the owner of the farm may live elsewhere. The REIS data tracks the final destination for the payment, not where the farm itself is located. The farm payments data include both commodity and conservation payments.

A first step is to identify counties that are top recipients of farm payments. The counties are clustered in the principal farm belts scattered throughout the nation: the Corn Belt stretching from Ohio to the Plains; the Wheat Belt stretching throughout the central and northern plains; the Cotton Belt stretching from Georgia to Texas; rice production spanning the Delta states, Texas, and California; and dairy production focused in New York, Wisconsin, and California. When the size of payments is factored in, however, spending is much more concentrated. One hundred fifty-eight counties collect a quarter of the payments—roughly \$4.5 billion a year. The counties in this top tier are concentrated in the Midwest, central and northern Plains, Delta, the Central Valley of California, and eastern Washington. Under the 2002 farm bill, however, the payments will be more concentrated in the South and West.

Cotton and rice programs in the 2002 farm bill were generously funded, and payments to these farmers have been, on average, bigger than to producers of crops grown in the Midwest. Finally, it is worth noting that the Phoenix area shows up on both. The only apparent explanation is that a large number of farmers have retired there, and the payments have followed.

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Which counties depend most on farm payments?

Before examining how the economy is performing in counties that receive farm payments, it is helpful first to identify the counties where the payments are most important to the local economy. These “farm-dependent” counties represent the 783 counties where farm payments have the biggest impact on the rural economy. Payments are most important in western portions of the Midwest, all of the Plains region, the Delta, and a sprinkling of counties in the South and Northwest. While states like Indiana and California receive a lot of payments, there are many other economic activities that overshadow agriculture.

Are farm payments boosting rural economic growth?

Farm payments are not providing a strong boost to the rural economy in those counties that most depend on them. Job gains are weak and population growth is actually negative in most of the counties where farm payments are the biggest share of income. These conclusions flow from examining employment and population growth over the decade that ended in 2002. Since farm payments have long been a pillar of farm policy, one would expect the impact to play out over time, and thus it is helpful to consider their long-term economic impact.

Job growth is decidedly weak in the counties most dependent on farm payments. The vast majority of such counties (483) had job gains below the 19% national average from 1992 to 2002. A considerable number (167) had outright job losses over the period. Only a sixth of the farm-dependent counties had above average growth in employment. These counties generally have two characteristics: They are near metro areas or they are emerging retail trade centers that are capturing a bigger market as retail trade consolidates. Goodland, Kansas, is a good example of a retail hub.

Farm payments have an even weaker impact on population growth. In fact, the vast majority of counties (461) are actually losing population. About a third have modest growth, while a small number (88) are posting population gains above the average 10% gain for the nation.

In short, farm payments are not yielding robust economic and population gains in the counties where

they should have the greatest impact. If anything, the payments appear to be linked with subpar economic and population growth. To be sure, this quick comparison cannot answer whether growth would have been even weaker in the absence of the payments. Still, farm payments appear to create dependency on even more payments, not new engines of growth.

Why is the impact not stronger?

This begs the question why the sizable federal payments are not spurring more economic growth. While the answer is likely complex, there are a few strong factors at work. As noted previously, most farm payments are attached to *commodity programs*. That is, farmers receive payments for growing certain commodities. Under the current farm bill, the most important commodities in terms of payments are corn, cotton, rice, wheat, and dairy. To stay in the business of producing such commodities, the overwhelming challenge for farmers is to be the low-cost producer. In farming, as in other industries, this means tapping all available economies of scale and getting bigger. As farms continue to consolidate, that means fewer jobs for all associated businesses—from implement dealers to bankers.

Simply put, commodity programs wed farming regions to an ongoing pattern of economic consolidation. It should not be surprising, therefore, that the very places that depend most on federal farm payments also happen to be places where economic consolidation is happening apace.

Building new rural economic engines

Many farming regions are beginning to explore whether new economic engines offer greater growth in the 21st century. While farm payments have been a mainstay in the production of commodities, the reality of consolidation is prompting a raft of questions about the future.

In much the same way, new questions are being asked about agricultural policy. If sustaining rural economic growth remains a primary goal, then new policy instruments must be found. Traditional programs simply do not provide the economic lift that farming regions need going forward. While society may continue to have a separate goal of lifting farm income, funds spent there can no longer be expected to spur broader growth in the rural economy.

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There are many possible paths that policy might take with rural economic growth as the goal. A critical feature in all of them, however, will be fostering a climate of business innovation and entrepreneurship. Economic analysts agree that innovation provides the fuel for building new economic engines.

Evidence suggests that current farm policy falls short in this dimension. Innovation is hard to measure. But one useful proxy is the rate of growth in new businesses. From 1990 to 2002, the growth in new business establishments was generally the weakest in counties most dependent on farm payments. By

focusing on commodities, farm payments again wed regions to consolidation—even fewer businesses.

Farm policy has a rich history of providing support to rural America. From the beginning it has served many goals, including raising the incomes of farmers and boosting economic gains in rural communities. While helping farmers may continue to be an important objective for farm policy, new approaches are needed if the nation wants to spur broader economic gains in rural regions.

Nancy Novack, associate economist in the Center, helped prepare this article. Reprinted with permission from The Main Street Economist; Figures not included. The maps that were originally published with this article are available in the html version of this story at <http://www.extension.iastate.edu/agdm/>



Beef cow sharing agreements

by William Edwards, extension economist, (515) 294-6161, wedwards@iastate.edu

Beef cow herds have always been a popular enterprise for small and medium sized farms in the Midwest. In recent years they have even been profitable! Since owning cattle involves a relatively high capital investment, many cow-calf enterprises are carried out jointly by two or more people. One party may own the breeding herd while another party supplies the labor to take care of them. Feed, health and other costs can be shared in a variety of ways—there are no hard and fast rules to follow.

Under joint agreements the question always arises as to how income should be shared. The basic principle is that the calves or the income from the sale of the calves should be shared in the same proportion as total costs of production. Noncash costs for contributions such as unpaid labor and owned pasture land should be included along with out-of-pocket costs. Besides labor, a management charge should be included to reflect both day-to-day and long-term decision making. A rule of thumb of 10 percent of all other costs can be used to value management.

Livestock share lease

Terms of a traditional livestock share lease call for the tenant to provide labor, machinery, half the livestock, half of the harvested or purchased feed,

and half of the seed, fertilizer, health, marketing and miscellaneous costs. Income is typically divided equally as well. Often cropland is included in the lease, as well, with costs shared according to traditional crop share lease provisions. If we add up the costs contributed by each party using the typical budget values in Example 1, we see that, indeed, the totals for the tenant and landlord are almost equal. Sales from cull cows and bulls are split equally, as well as the calf income, and both parties help purchase or contribute replacement heifers and bulls.

Other arrangements

Some landowners prefer to provide all the livestock and land, but not pay any other expenses. Their contributions would consist of the breeding livestock, pasture, land for hay and stalk grazing, and corrals and fences. Example 2 shows that these costs add up to about 40 percent of the total, so calf income would be divided 40 percent to the owner and 60 percent to the operator.

Another variation is for an investor to provide only the livestock, which represents about 15 percent of the total costs. At the other extreme, someone who contributes only labor to care for the herd on someone else's property would earn about 20 to 25 percent of the revenue or calf crop.

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Many other combinations are possible, and can be evaluated by simply adding the estimated costs of each party's contribution and converting it to a percentage of the total. Naturally, actual costs should be substituted for typical costs whenever possible. If calves will be carried to a heavier weight, additional costs for feed, health, and labor would need to be incorporated.

Income from culled breeding stock

The breeding herd should be treated as a capital asset, just like land, machinery or buildings. Ownership records of each individual animal should be carefully maintained, for tax records. The income received from selling cull cows, bulls and heifers should go to the owner(s) of the livestock, regardless

of how the calves are shared. Likewise, the owner of the herd should provide replacement bulls and heifers. These may be purchased from outside or drawn from the herd owner's share of the calf crop.

Management decisions

When a good working relationship exists between the parties, all management decisions may be made by mutual agreement. The person providing the labor is usually responsible for day-to-day management decisions about feeding, breeding and treating health problems. However, larger decisions such as buying or selling livestock or setting the general feeding, breeding and health programs should be discussed well in advance.

Lease agreement

Written agreements help avoid disagreements later on. A sample cow-calf share lease agreement is available from the Manitoba Agriculture and Food Agency, at: www.gov.mb.ca/agriculture/financial/farm/caf22s01.html.

To access additional information about beef cow sharing agreements, including a decision aid spreadsheet to help evaluate the contributions of each party, go to the Farm Economics Current Issues Web site at <http://www.extension.iastate.edu/feci/cow-share/>.

Cow-Calf Budget-(calves sold after weaning)					
Cost Item	Cost per Cow Unit	Example 1 Livestock Share Lease		Example 2	
		Owner	Operator	Owner	Operator
Pasture land (2.5 acres @ \$30)	\$75.00	\$75.00		\$75.00	
Pasture fertility, weed control	50.00	25.00	25.00		\$50.00
Corn (4 bu. @ \$2.00)	8.00	4.00	4.00		8.00
Supplement and minerals	9.00	4.50	4.50		9.00
Mixed hay (2 tons)	5.00	2.50	2.50	30.00	5.00
- seed	26.00	13.00	13.00		26.00
- annual fertility, pesticides	18.00	30.00	18.00		18.00
- labor	34.00		34.00		34.00
- machinery	30.00				
- land					
Stalk grazing (4 acres @ \$3)	12.00	6.00	6.00	12.00	
Health	25.00	12.50	12.50		25.00
Utilities	5.00	5.00		5.00	
Machinery, fuel, repairs	10.00		10.00		10.00
Marketing, miscellaneous	20.00	10.00	10.00		20.00
Interest on feed, other costs	9.50	5.35	4.15	3.50	6.00
Interest, depreciation, insurance	18.00	25.00	18.00	25.00	18.00
- machinery and equipment	25.00	45.00	45.00	90.00	
- fences and corrals	90.00				
- breeding herd					
- bull replacement	12.00	6.00	6.00	12.00	
Labor (9 hours @ \$9)	81.00		81.00		81.00
Management (10% of costs)	54.00	27.00	27.00		54.00
Total	\$616.50	\$295.85	\$320.65	\$252.50	\$364.00
Percent contributions		48%	52%	41%	59%

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Internet updates

In addition to the Handbook updates, the following updates have been added to www.extension.iastate.edu/agdm.

Selecting an Appropriate Pricing Strategy—C5-17 (3 pages)

Decision Aids

Grant In-Kind Match Contributions

Travel Expense Voucher

Value-Added Processing Facility Start-up Costs

... and justice for all

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