

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Date of Communication: Not Applicable

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CASE-MIS No.: TAM-129412-04/CC:PSI:B06

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No
Years Involved:
Date of Conference:

LEGEND:

Taxpayer:

ISSUES:

1. Whether the tangible personal property, land improvements, and non-residential real property used in connection with _____ operations is includible in MACRS Asset Guideline Class 80.0, "Theme and Amusement Parks" as described in Rev. Proc. 87-56, 1987-2 C.B. 674, for depreciation purposes.

2. If the tangible personal property, land improvements, and non-residential real property used in connection with _____ operations are not properly includible in MACRS Asset Guideline Class 80.0, how should the assets be treated for depreciation purposes?

CONCLUSIONS:

1. The tangible personal property, land improvements, and non-residential real property used in connection with _____ operations are not includible in MACRS Asset Guideline Class 80.0, "Theme and Amusement Parks," as described in Rev. Proc. 87-56, for depreciation purposes.

2. The tangible personal property used in connection with _____ operations is includible in MACRS Asset Guideline Class 79.0, "Recreation," for depreciation purposes. The _____, as well as other structures and land improvements used in connection with _____ operations, are excluded from asset class 79.0 and are land improvements described in MACRS Asset Guideline Class 00.3, "Land Improvements," or, if they meet the definition of a building set forth in § 1.48-1(e)(1) of the Income Tax Regulations, nonresidential real property.

FACTS:

Taxpayer owns or operates _____ live entertainment venues, or facilities, within the United States, of which _____ are at issue in this memorandum. (A list of the _____ at issue herein is attached as Exhibit A). The average size of these facilities is approximately _____, and the _____ themselves can generally seat _____ patrons. Patrons generally have access to the entire grounds by paying for admission to the attraction. The attraction is usually entertainment, typically a musical or comedy performance, but the _____ are also used for seasonal entertainment _____.

_____ Patrons at an _____ event generally may purchase either reserved or general admission seating. Reserved seating is closer to the stage and is generally under cover and general admission seating is situated directly behind the reserved seating on a _____. Most _____ have a majority of their entertainment performances between _____.

The premises surrounding the _____ include large, mown grass areas, open concourse areas, and areas where, in addition to the musical attraction, patrons can eat, browse through kiosks and stands (typically 8-10, depending on the attraction), and participate in or view other activities, _____.

_____ Each _____ has multiple dining and eating areas including food and beverage concessions, vending carts, and picnic areas. At some _____ there are ponds or other waterways.

The permanently situated assets at issue include, but are not limited to, _____ seating and related costs, concrete with removable bench or individual seating, reserved seating, stage, landscaping, site lighting, paving, sidewalks, fences, parking lots, and exterior decorative lighting. Also included are assets that provide other _____.

support functions including, but not limited to, food and beverage retailing, souvenir vending, ticket booths, facades, and special purpose structures such as dressing rooms, restrooms, smoking lounges, VIP structures, and catering buildings.

LAW AND ANALYSIS:

Section 167(a) of the Internal Revenue Code provides a depreciation allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in a trade or business or held for the production of income. The depreciation deduction provided by section 167(a) for tangible property placed in service after 1986 generally is determined under section 168. This section prescribes two methods of accounting for determining depreciation allowances. One method is the general depreciation system in section 168(a) and the other method is the alternative depreciation system in section 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

For purposes of either section 168(a) or section 168(g), the applicable depreciation method and recovery period are determined by reference to class life or by statute. The term "class life" is defined in section 168(i)(1) as meaning the class life (if any) that would be applicable with respect to any property as of January 1, 1986, under section 167(m) (determined without regard to section 167(m)(4) and as if the taxpayer had made an election under section 167(m)) as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990. Former section 167(m) provided that in the case of a taxpayer who elected the asset depreciation range system of depreciation, the depreciation allowance would be computed based on the class life prescribed by the Secretary that reasonably reflected the anticipated useful life of that class of property to the industry or other group.

Section 1.167(a)-11(b)(4)(iii)(b) provides rules for classifying property under former section 167(m). Property is included in the asset guideline class for the activity in which the property is primarily used.

Section 1.48-1(e)(1) defines a "building" as any structure or edifice enclosing a space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing or to provide working, office, parking, display, or sales space. The term includes, for example, structures such as apartment houses, factory and office buildings, warehouses, barns, garages, railway or bus stations, and stores.

The class lives of property subject to depreciation under section 168 are set forth in Rev. Proc. 87-56. This revenue procedure divides assets into two broad categories: (1) Asset Classes 00.11 through 00.4 that consist of specific depreciable assets used in all business activities; and (2) Asset Classes 01.1 through 80.0 that consist of depreciable assets used in specific business activities. An asset that falls within both an asset category (that is, Asset Classes 00.11 through 00.4) and an activity category (that is, Asset Classes 01.1 through 80.0) is classified in the asset category. See [Norwest Corp.](#)

& Subs. v. Commissioner, 111 T.C. 105, 156-64 (1998). The business activity Asset Classes described below are set forth in Rev. Proc. 87-56.

Asset class 00.3, Land Improvements:

Includes improvements directly to or added to land, whether such improvements are section 1245 property or section 1250 property, provided such improvements are depreciable. Examples of such assets might include sidewalks, roads, canals, waterways, drainage facilities, sewers (not including municipal sewers in Class 51), wharves and docks, bridges, fences, landscaping shrubbery, or radio and television transmitting towers. Does not include land improvements that are explicitly included in any other class, and buildings and structural components as defined in section 1.48-1(e) of the regulations. Excludes public utility initial clearing and grading land improvements as specified in Rev. Rul. 72-403, 1972-2 C.B. 102.

Asset class 79.0, Recreation:

Includes assets used in the provision of entertainment services on payment of a fee or admission charge, as in the operation of bowling alleys, billiard and pool establishments, theaters, concert halls, and miniature golf courses. Does not include amusement and theme parks and assets which consist primarily of specialized land improvements or structures, such as golf courses, sports stadia, race tracks, ski slopes, and buildings which house the assets used in entertainment services.

Asset class 80.0, Theme and Amusement Parks:

Includes assets used in the provision of rides, attractions, and amusements in activities defined as theme and amusement parks, and includes appurtenances associated with a ride, attraction, amusement, or theme setting within the park such as ticket booths, facades, shop interiors, and props, special purpose structures, and buildings other than warehouses, administration buildings, hotels, and motels. Includes all land improvements for or in support of park activities (e.g., parking lots, sidewalks, waterways, bridges, fences, landscaping, etc.), and support functions (e.g., food and beverage retailing, souvenir vending and other nonlodging accommodations) if owned by the park and provided exclusively for the benefit of park patrons. Theme and amusement parks are defined as combinations of amusements, rides, and attractions which are permanently situated on park land and open to the public for the price of admission. This guideline class is a composite of all assets used in this industry except transportation equipment (general purpose trucks, cars, airplanes, etc., which are included in asset guideline classes with the

prefix 00.2), assets used in the provision of administrative services (asset classes with the prefix 00.1), and warehouses, administration buildings, hotels, and motels.

Asset class 80.0 was introduced in Rev. Proc. 74-32, 1974-2 C.B. 487. Prior to that revenue procedure, class 79.0 described those activities now encompassed within class 80.0 and was entitled "Recreation and Amusement." Former class 79.0 was described in Rev. Proc. 72-10, 1972-1 C.B. 721, 731, as including assets used in the provision of amusement or entertainment services on payment of a fee or admission charge, as in the operation of bowling alleys, billiard and pool establishments, theatres, concert halls, amusement parks, and miniature golf courses. Former class 79.0 specifically did not include such assets which consist primarily of specialized land improvements or structures, such as golf courses, sports stadia, racetracks, ski slopes, or buildings which house bowling alleys.

As mentioned previously, under former § 167(m)(1), a taxpayer depreciated an asset based on the class life prescribed by the Secretary which reasonably reflects the anticipated useful life of that class of property to the industry or other group. Similarly, when § 168(i)(1)(B) was enacted as part of the Tax Reform Act of 1986, Congress gave permission to the Secretary (except in the case of residential real property or non-residential real property) to prescribe a new class life for any property or modify the class life for any assigned property, and instructed that any class life or assigned item prescribed or modified under this authority shall reasonably reflect the anticipated useful life, and the anticipated decline in value over time, of the property to the industry or other group. The anticipated useful life of the property was linked to the "industry or other group," because it was expected that taxpayers in the same business activity would have similar experiences.

In the present case, the initial issue raised is whether the activity conducted by the taxpayer at its _____ is within that activity described in class 80.0. Application of class 80.0 is limited to theme and amusement parks, defined in class 80.0 as "combinations of amusements, rides, and attractions which are permanently situated on park land and open to the public for the price of admission." While the description of class 80.0 in Rev. Proc. 87-56 contains a listing of the assets included within that class, this definition is the starting point for determining whether the activity under consideration is within class 80.0. The _____ at issue here have few, if any, amusements, rides, or other attractions that are permanently situated on park land. While the Taxpayer does point out the comfort of both the reserved and general admission seating, and makes reference to the VIP structures and smoking lounges, such facilities are not amusements or attractions within the meaning of class 80.0. Rather, the Taxpayer's attraction is the entertainment or other event offered at the _____. None of these attractions or events is permanently situated on park land; rather, they are ever-changing, appearing at the _____ temporarily and moving on to the next venue after a short time. Similarly, the assets used in connection with _____ other activities are not permanently situated at the park. Some of these

assets are owned by third parties and therefore are not eligible for depreciation by the Taxpayer. While the VIP structures and smoking lounges, and the kiosks or other structures from which the concession sales are made, may be permanently situated on park land, they are not representative of the types of attractions and amusements that define the class. Rather, these structures are the types of assets referred to in class 80.0 as “appurtenances associated with a ride, attraction, amusement, or theme setting within the park.” When such assets are used in connection with a theme or amusement park activity, this language makes clear that these assets are includible in class 80.0. Without this specific language, such assets would be classified as buildings or land improvements and would not be includible in the class. However, these types of assets are not unique to theme and amusement parks, and their presence does not compel a class 80.0 characterization. As previously discussed, class 80.0 defines theme and amusement parks in terms of “amusements, rides, or other attractions permanently situated on park land.” The appurtenance assets are not part of the definitional component of the class.

In contrast, the traditional theme or amusement park has rides and other attractions that remain at the park site until replaced due to economic or physical obsolescence. When asset class 80.0 was established by the Treasury Department, a relatively short recovery period was provided for a mixture of assets that included certain buildings and land improvements. As indicated above, this short recovery period was reflective of the anticipated useful life experience of assets used in the theme and amusement park industry. Because of the nature of this industry, continuous capital expenditures are incurred to replace assets before economic and physical obsolescence of the assets. Such replacement is necessary in order to attract returning customers. See generally, A Study of the Theme and Amusement Park Industry (Office of Industrial Economics, January 28, 1974). The Taxpayer in the present case is not subject to the same experience because its customers are attracted by the ever-changing events provided at the Taxpayer’s venues.

The mere presence of a park-like setting, such as that surrounding the _____ at _____ issue, is not sufficient to transform the Taxpayer’s activity into a theme or amusement park activity. An amusement park may not have a park-like setting.

Having concluded that the activity at issue is not included within class 80.0, we will now consider the proper classification of that activity. Class 79.0, drafted more broadly than class 80.0, includes “assets used in the provision of entertainment services on payment of a fee or admission charge, as in the operation of ... theatres, concert halls, and miniature golf courses.” The class clearly encompasses both indoor and outdoor venues. However, the class specifically excludes (1) specialized land improvements and structures such as golf courses, sports stadia, race tracks, ski slopes, and (2) buildings which house the assets used in providing the entertainment services. Thus, class 79.0 encompasses assets used to provide entertainment services, but not the land improvements and buildings used in providing those services. (Assets

encompassed within class 80.0, by contrast, include associated structures and most buildings, excepting only warehouses, administration buildings, hotels, and motels.) For example, assets such as audio visual equipment used to provide musical and other entertainment services in a concert hall or theatre are included within class 79.0, while the actual concert hall or theatre is not.

In the present case, the entertainment and other events offered at Taxpayer's are entertainment services and the assets used to provide those entertainment services are included within class 79.0. The fact that Taxpayer presents such entertainment and attractions in a venue at which most of the seating is uncovered and is surrounded by a park-like setting does not change the fundamental nature of the activity. However, the assets (to the extent included in the definition of buildings or structural components as set forth in § 1.48-1(e)) and land improvements described in class 00.3 are specifically excluded from class 79.0.

The specific exclusion of land improvements and buildings from class 79.0 does not indicate that those assets were moved to class 80.0 when that class was created out of former class 79.0. The separate exclusion contained within the description of class 79.0 for "amusement and theme parks" describes the sum of the assets moved from former class 79.0 to class 80.0. Accordingly, land improvements associated with a class 79.0 activity are included in asset class 00.3. Buildings associated with a class 79.0 activity are depreciated as nonresidential real property, if they meet the definition of a building set forth in § 1.48-1(e)(1), under the rules in §§ 168(c) and 168(g)(2)(C).

CAVEAT

A copy of this technical advice memorandum is to be given to the taxpayer. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.