

Part I

Section 167.-Depreciation

26 CFR 1.167(a)-2: Tangible 1245 property.
(Also §§ 168, 1245, 1250, 1.1245-3.)

Rev. Rul. 2003-54

ISSUE

How are gasoline pump canopies and their supporting concrete footings classified for depreciation purposes?

FACTS

Most retail motor fuel outlets feature gasoline pump canopies. These canopies protect customers and the gasoline pumps from weather conditions and also serve as advertising displays for the fuel outlet business. Generally, the canopies are not attached to buildings or other structures. The typical "stand-alone" gasoline pump canopies in use today are constructed in the manner described below.

Concrete footings are constructed by local contractors to specifications provided by a canopy manufacturer. Concrete is poured around a cage of rebar embedded in the ground at the fuel outlet site. Anchor bolts protrude from the footings. Footings are constructed for each vertical support column of the canopy. Each support column has a welded plate on the base with holes designed for the anchor bolts. Each column is bolted

onto a footing, usually 1 to 2 feet below grade. Nuts on the anchor bolts are used for leveling the column. Electrical and fluid conduits are constructed in and around the columns. Earth or other material is graded over the footing. A concrete cap, 1 to 2 inches thick, may be poured over the footing.

The support columns also have welded plates at the top. Main support beams are laid parallel to each other across two column sets and bolted to each column's plate. For canopies with single row column designs, the main beams are bolted to each column. Secondary beams are bolted at right angles to the main support beams. Purlins are bolted across the secondary beams to support the decking. A steel outrigger frame is bolted along the perimeter of the structural steel skeleton to support the fascia panels. Decking and fascia panels, constructed of sheet metal and designed to be interlocking, are attached to the canopy structure by clamps.

Gasoline pump canopies constructed in the manner described above are sometimes dismantled and relocated for various reasons including ground lease expiration or termination provisions, outlet expansions, and re-imaging. Because of the method of canopy construction, dismantling and removal can be accomplished by a small crew in a matter of hours or days. The dismantling process is the reverse of the construction process. Fascia panels, light fixtures, and decking panels are removed and lowered to the ground. The steel support structure is disassembled by unbolting and removing the various components in sequence, starting with the outrigger framing, followed by the purlins, secondary beams, and main beams. The cement caps covering the concrete footings are broken and removed to expose the bases of the support columns. The columns are

supported by heavy equipment while the base plates are unbolted from the footings and the columns removed. The footings remain embedded in the ground where they were poured.

The canopy structure and concrete footings sustain minimal damage during the dismantling and removal process. Most components of the canopy structure are reusable.

The cost of dismantling, removing, and reinstalling a used canopy structure is significantly less than the cost of purchasing and installing a new canopy structure.

LAW AND ANALYSIS

Section 167(a) of the Internal Revenue Code provides that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion and wear and tear of property used in a trade or business or held for the production of income.

The depreciation deduction provided by § 167(a) for tangible property placed in service after 1986 generally is determined under § 168, which prescribes two methods of accounting for determining depreciation allowances: (1) the general depreciation system in § 168(a); and (2) the alternative depreciation system in § 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

The applicable recovery period for purposes of § 168(a) or § 168(g) is determined by reference to class life. Section 168(i)(1) provides that the term “class life” means the class life (if any) that would be applicable with respect to any property as of January 1, 1986, under former § 167(m) as if it were in effect and the taxpayer had elected under that section. Prior to its revocation, § 167(m) provided that if a taxpayer elected the asset depreciation range system of depreciation, the depreciation deduction 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) of the Income Tax Regulations provides rules for classifying property under former § 167(m) and, under these rules, property is included in the asset guideline class for the activity in which the property is primarily used.

Rev. Proc. 87-56, 1987-2 C.B. 674, sets forth the class lives of property that are necessary to compute the depreciation allowance under § 168. This revenue procedure establishes two broad categories of depreciable assets: (1) asset classes 00.11 through 00.4 that consist of specific assets used in all business activities; and (2) asset classes 01.1 through 80.0 that consist of assets used in specific business activities. The same item of depreciable property may be described in both an asset category (asset classes 00.11 through 00.4) and an activity category (asset classes 01.1 through 80.0), in which case the item is generally classified in the asset category. See *Norwest Corporation & Subsidiaries v. Commissioner*, 111 T.C. 105 (1998).

Asset class 57.0 of Rev. Proc. 87-56 includes assets used in wholesale and retail trade, personal and professional services, and section 1245 assets used in marketing petroleum and petroleum products. Assets in class 57.0 have a recovery period of 5 years for purposes of § 168(a) and 9 years for purposes of § 168(g). Asset class 57.1 includes (i) section 1250 assets, including service station buildings and (ii) depreciable land improvements, whether section 1245 property or section 1250 property, used in the marketing of petroleum and petroleum products, but not including any facilities related to petroleum and natural gas trunk pipelines. Assets in class 57.1 have a recovery period of

15 years for purposes of § 168(a) and 20 years for purposes of § 168(g). Accordingly, with the exception of assets included in the asset categories for specific assets used in all business activities (classes 00.11 through 00.4), all assets used in the business activity of petroleum marketing are included in asset class 57.0 or asset class 57.1. Gas station canopies and their supporting concrete footings are not listed among the assets described in asset classes 00.11 through 00.4.

Section 1245(a)(3) provides that section 1245 property includes any property that is of a character subject to the allowance for depreciation under § 167 and is either personal property or certain other property described within § 1245(a)(3)(B) through (F). Section 1.1245-3(b) provides that "personal property" includes tangible personal property as defined in § 1.48-1(c) (relating to the definition of "section 38 property" for purposes of the investment tax credit) and intangible personal property. Section 1.48-1(c) provides that "tangible personal property" means any tangible property except land and improvements thereto, such as buildings or other inherently permanent structures (including items that are structural components of such buildings or structures). Therefore, section 1245 property used in petroleum marketing that is tangible personal property is included in asset class 57.0. Asset class 57.1 includes buildings used in petroleum marketing, which are section 1250 property, and other inherently permanent structures used in petroleum marketing, regardless of whether the structures are section 1245 property or section 1250 property.

The question of whether a particular structure is inherently permanent was initially addressed by the Service in the context of the investment tax credit provisions.

Rev. Rul. 75-178, 1975-1 C.B. 9, provides that the classification of property as "personal"

or "inherently permanent" should be made on the basis of the manner of attachment to the land or the structure and how permanently the property is designed to remain in place.

In Whiteco Industries, Inc. v. Commissioner, 65 T.C. 664 (1975), acq., 1980-1 C.B. 1, the Tax Court concluded that outdoor advertising displays were tangible personal property that qualified for the investment tax credit rather than inherently permanent structures. The court set forth the following questions to be considered in deciding whether property (other than items in the nature of machinery) is to be classified as tangible personal property: (1) Is the property capable of being moved, and has it in fact been moved? (2) Is the property designed or constructed to remain permanently in place? (3) Are there circumstances that tend to show the expected or intended length of affixation, that is, are there circumstances that show the property may or will have to be moved? (4) How substantial a job is removal of the property, and how time-consuming is it? (5) How much damage will the property sustain upon its removal? (6) What is the manner of affixation of the property to the land?

In Rev. Rul. 80-151, 1980-1 C.B. 7, the Service announced that it would apply the criteria set forth by the court in Whiteco in determining whether outdoor advertising displays are tangible personal property. The revenue ruling also provides that outdoor advertising displays will not be categorically treated as being either tangible personal property or inherently permanent structures. Rather, the Whiteco criteria will be applied on a case-by-case basis to determine whether a particular outdoor advertising display should be treated as tangible personal property.

In JFM, Inc. and Subsidiaries v. Commissioner, T.C.M. 1994-239, the Tax Court

concluded, based on the application of the Whiteco criteria, that certain gasoline pump canopies were not inherently permanent structures for depreciation purposes. Stating that no one factor is necessarily decisive and that each, to some extent, is probative, the court found that the canopies were capable of being moved, noted that some had been moved, were subject to lease agreements that could require canopy removal, were constructed in such a way as to be easily dismantled in a few days with most components being reusable, and were affixed to the land by being bolted to concrete footings. The court noted that the concrete footings are residual structures that remain on the land after the canopy structure is unbolted.

The depreciation classification of the gasoline pump canopies and the supporting concrete footings described in this revenue ruling depends upon whether the canopies and footings are inherently permanent structures. This determination is made by application of the Whiteco criteria. As noted by the court in JFM, no one factor is decisive.

Application of the Whiteco factors to the stand-alone gasoline pump canopies described above indicates that these canopies are not inherently permanent structures. The canopies are capable of being moved and, on occasion, have been relocated to other fuel outlet sites. The canopies' construction facilitates easy, cost effective removal in a short period of time and minimal damage is sustained by the canopies during the dismantling and removal process. In some factual settings ground lease provisions and re-imaging histories may provide additional indications of affixation length. With regard to the concrete footings, however, application of the Whiteco factors indicates that these footings are inherently permanent structures. The footings are not constructed in a manner that enables them to be

removed with the canopy structure. If a canopy is moved the footings remain embedded in the ground. The footings are directly attached to the land and permanently affixed thereto.

HOLDING

The gasoline pump canopies described in this revenue ruling are not inherently permanent structures and are classified as tangible personal property includible in asset class 57.0 of Rev. Proc. 87-56 for depreciation purposes. The supporting concrete footings are inherently permanent structures classified as land improvements includible in asset class 57.1 of Rev. Proc. 87-56 for depreciation purposes.

CHANGE IN METHOD OF ACCOUNTING

Any change in a taxpayer's treatment of the cost of gasoline pump canopies or the cost of the supporting concrete footings to conform with this revenue ruling is a change in method of accounting to which the provisions of §§ 446 and 481 and the regulations thereunder apply.

A taxpayer wanting to change the method of accounting for the cost of gasoline pump canopies or supporting concrete footings owned by the taxpayer at the beginning of the year of change (and for which the taxpayer has used another method of computing depreciation in at least two taxable years immediately preceding the year of change) to conform with this revenue ruling must follow the automatic change in method of accounting provisions in Rev. Proc. 2002-9, 2002-3 I.R.B. 327 (as modified and amplified by Rev. Proc. 2002-19, 2002-13 I.R.B. 696, modified and clarified by Announcement 2002-17, 2002-8 I.R.B. 561, and amplified, clarified, and modified by Rev. Proc. 2002-54, 2002-35 I.R.B. 432) (or its successor), with the following modifications:

- (1) The scope limitations in section 4.02 of Rev. Proc. 2002-9 do not apply to a

taxpayer that wants to change its method of accounting for the cost of gasoline pump canopies or supporting concrete footings to conform with this revenue ruling for either its first or second taxable year ending after December 31, 2001, provided the taxpayer's method of accounting for the cost of gasoline pump canopies or supporting concrete footings is not an issue under consideration, within the meaning of section 3.09 of Rev. Proc. 2002-9, for taxable years under examination, before an appeals office, or before a federal court at the time the Form 3115 is filed with the national office; and

(2) To assist the Internal Revenue Service in processing changes in method of accounting under this revenue ruling, and to ensure proper handling, section 6.02(4)(a) of Rev. Proc. 2002-9 is modified to require that a Form 3115 filed under this revenue ruling include the statement "Automatic Change Filed Under Rev. Rul. 2003-54." This statement should be legibly printed or typed on the appropriate line on the Form 3115.

AUDIT PROTECTION

If a taxpayer is currently treating the cost of gasoline pump canopies or supporting concrete footings in conformance with this revenue ruling, the treatment of such canopies or footings will not be raised as an issue by the Service in a taxable year that ends before May 8, 2003, or any subsequent taxable year. Additionally, if a taxpayer is currently treating the cost of gasoline pump canopies or supporting concrete footings in conformance with this revenue ruling, and its use of that method is an issue under consideration (within the meaning of section 3.09 of Rev. Proc. 2002-9) in examination, in appeals, or before the U.S. Tax Court in a taxable year that ends before May 8, 2003, that issue will not be further pursued by the Service.

A taxpayer may continue to use its present method of treating the cost of gasoline pump canopies placed in service during any taxable year beginning before May 8, 2003, as land improvements includible in asset class 57.1 of Rev. Proc. 87-56 for depreciation purposes.

EFFECT ON OTHER DOCUMENTS

Rev. Rul. 68-345, 1968-2 C.B. 30, is obsolete. Rev. Proc. 2002-9 is modified and amplified to include this change in method of accounting in section 2 of the APPENDIX.

DRAFTING INFORMATION

The principal author of this revenue ruling is Winston H. Douglas of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Mr. Douglas at (202) 622-3110 (not a toll-free call).