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EMPLOYEE HANDLING OF LISTED PROPERTY

— by Neil E. Harl*

For many years,[1] property capable of both business use and personal use and classified as "listed property" has been subject to special rules on depreciation that can be claimed.[2] Additional limitations are imposed on the use of listed property by employees.[3]

General rules

The statute designates six classes of property as "listed property"— (1) passenger automobiles,[4] (2) any other property used as a means of transportation,[5] (3) property "of a type generally used" for "entertainment, recreation or amusement,"[6] (4) computers or peripheral equipment,[7] (5) cellular telephones (or "other similar telecommunications" equipment)[8] and (6) "any other property" added by regulations.[9] The term "passenger automobile" is defined as a four wheel vehicle manufactured primarily for use on public streets, roads and highways of 6,000 pounds unloaded gross vehicle weight or less (gross vehicle weight for trucks and vans).[10] These vehicles are subject to dollar limits on depreciation that can be claimed each year.[11] For vehicles placed in service in 1997, those figures are $3,160 the first year, $5,000 the second year, $3,050 the third year and $1,775 each succeeding year.[12] Vehicles used as a means of transportation that are not "passenger automobiles" are "listed property" but are not subject to the dollar limitations on depreciation claimable.[13]

For all items of listed property, if the property is not "predominantly used in a qualified business use," expense method depreciation may not be claimed[14] and depreciation deductions must be calculated using the alternative depreciation method.[15] The term "predominantly" means used more than 50 percent in a qualified business use.[16] If that condition is met, MACRS depreciation deductions may be claimed to the extent of the business use percentage.

Employee use

For an employee acquiring a mixed use asset subject to the "listed property" rules,[17] usage is not considered as business use unless it is for the convenience of the employer and is required as a condition of employment.[18] Those two tests have been extraordinarily difficult to meet. Indeed, employees have only rarely been successful in obtaining a deduction for listed property. Thus, an elementary school teacher has been unsuccessful in obtaining a depreciation deduction for a home computer,[19] an OSHA employee has failed in obtaining a deduction for a computer printer,[20] an engineer has been unable to claim a depreciation deduction for a computer used at home,[21] an insurance salesman has been denied a deduction for a computer purchased for use when visiting clients to perform computer functions otherwise performed by office staff,[22] and a computer staff analyst who purchased a home computer to reduce travel time and avoid the effects of adverse weather was unsuccessful in obtaining a deduction[23]

A 1996 Tax Court case, however, allowed a deduction for home use of a computer and printer.[24] In the facts of that case, the taxpayer was a telemarketing sales manager for a regional telephone company.[25] The taxpayer used the computer and printer to access information at home via modem to keep up with her work. The taxpayer was denied access to her office after regular business hours so she was unable to use the office computer.

The court cited approvingly a case stating that the "convenience of the employer" test and the "condition of employment" test in the context of lodging provided to an employee[26] were essentially the same.[27] The court stated that the tests are facts and circumstances in nature, that the employer need not explicitly require the employee to use the property but yet a mere statement by the employer that use of the property is a condition of employment is not sufficient.[28] The court pointed out that in order to satisfy the condition of employment requirement, the use of the property must be required in order for the employee to perform the duties of employment properly.[29] The Tax Court agreed with the taxpayer in *Mulne v. Commissioner* and held that the purchase of the computer and printer was for the convenience of the employer and was required as a condition of employment.[30] Accordingly, the taxpayer was allowed to claim expense method depreciation on the computer and printer which were both used exclusively for business purposes.[31]

The court also examined the question of whether the cost of a camera and a telephone were deductible. The court stated that neither item was listed property. The camera was found to be used exclusively for business purposes and qualified for expense method depreciation;[32]

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the court denied a deduction for the telephone on the grounds it was not an ordinary and necessary expense and the court doubted that the telephone was used in the home office only for business purposes.[33]

In conclusion

In light of the cases and rulings to date, it is clear that employees bear a fairly heavy burden in establishing deductibility for listed property items such as computers. However, it is possible to succeed in obtaining a depreciation deduction if the facts in support of deductibility are persuasive.[34]

FOOTNOTES

1 Deficit Reduction Act of 1984, Pub. L. 98-369, Sec. 179(a), 98 Stat. 713 (1984) (applicable to property placed in service after June 18, 1984, in tax years ending after that date).
2 See I.R.C. § 280F. See generally 4 Harl, *Agricultural Law* § 29.03[10](1997); Harl, *Agricultural Law Manual* § 4.03 [4][g][iii](1997).
3 I.R.C. § 280F(d)(3).
4 I.R.C. § 280F(d)(4)(A)(i).
5 I.R.C. § 280F(d)(4)(A)(ii).
6 I.R.C. § 280F(d)(4)(A)(iii).
7 I.R.C. § 280F(d)(4)(A)(iv).
8 I.R.C. § 280F(d)(4)(A)(v).
9 I.R.C. § 280F(d)(4)(A)(vi).
10 I.R.C. § 280F(d)(5).
11 I.R.C. §§ 280F(a)(1), 280F(d)(5). See Rev. Proc. 97-20, I.R.B. 1997-11, 10.
12 Rev. Proc. 97-20, I.R.B. 1997-11, 10.
13 I.R.C. §§ 280F(a)(1), 280F(d)(4)(A)(ii).
14 I.R.C. § 280F(d)(1).
15 I.R.C. § 280F(b)(1).
16 I.R.C. § 280F(b)(3). See McFadden v. Comm'r, T.C. Memo. 1989-174 (automobile used 22 percent of time for business use).
17 I.R.C. § 280F(d)(3).
18 I.R.C. § 280F(d)(3)(A).
19 Bryant v. Comm'r, T.C. Memo, 1993-597, *aff'd in Unpub. Op.* (3d Cir. 9/15/94).
20 McCann v. Comm'r, T.C. Memo. 1996-120.
21 Rev. Rul. 86-129, 1986-2 C.B. 48.
22 Ltr. Rul. 8710009, Dec. 3, 1986.
23 Ltr. Rul. 8725067, March 25, 1987.
24 Mulne v. Comm'r, T.C. Memo. 1996-320.
25 *Id*.
26 See I.R.C. § 119.
27 See United States Junior Chamber of Commerce v. Comm'r, 334 F.2d 660, 663 (Ct. Cl. 1994) (employee required to accept lodging for the convenience of the employer as a condition of employment under I.R.C. § 119).
28 See Temp. Treas. Reg. § 1.280F-6T(a)(2)(ii).
29 *Id*.
30 T.C. Memo. 1996-320.
31 *Id*.
32 *Id*.
33 *Id*.
34 Mulne v. Comm'r, T.C. Memo. 1996-320.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

CONTINUOUS POSSESSION. The disputed land was .534 acres included in the title held by the plaintiff farmer. The land was triangular shaped and fenced on two sides and provided access to a road to the defendant's residence. The defendant's parents purchased the ranch next to the disputed land and the fences made it appear that the disputed land was included in the property purchased. The defendant's parents used the disputed land for walking cows from pasture to the milking area, allowing the cows to pasture temporarily on the disputed land. The plaintiff occasionally used the disputed land for hunting and had to climb over, under or walk around the fence in order to enter the disputed land. The trial court had ruled for the plaintiff because the disputed land was not entirely fenced in. The appellate court held that the defendant's use of the disputed land was sufficient to amount to actual possession given the partial fencing of the land, since the defendant's use would not have been possible if the third side was fenced. However, because the land was transferred from the defendant's parents to the defendant less than 21 years before the dispute and the transferred title made no mention of the disputed land, the defendant could not include the parents' possession; therefore, the defendant did not have possession long enough to give rise to title by adverse possession. **Moore v. Duran, 687 A.2d 822 (Pa. Super. 1996)**.

BANKRUPTCY

GENERAL-*ALM* § 13.03.*

EXEMPTIONS

HOMESTEAD. The debtors had claimed a homestead exemption for their residence under 188 Mass. Gen. Laws § 1. The trustee objected to the exemption to the extent of debts incurred by the debtors prior to their filing of a homestead declaration. The court denied the objection, holding that Section 522(c) pre-empted the state law limitations on the homestead exemption and allowed the exemption as to all pre-petition debts. ***In re* Whalen-Griffin, 206 B.R. 277 (Bankr. D, Mass. 1997)**.

Chapter 12-*ALM* § 13.03.*

CLAIM. The debtor was a co-obligor with the debtor's parent on a secured loan. The debtor and parent operated separate farm operations, although the