



**Agricultural Law Press**

Publisher/Editor

Robert P. Achenbach, Jr.

Contributing Editor

Dr. Neil E. Harl, Esq.

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## As “Bonus” Depreciation Fades From the Scene, Eligibility for “Plants” Ramps Up

-by Neil E. Harl\*

As many remember, so-called “bonus” depreciation appeared on the scene in 2002 at a 30 percent rate with an objective of improving U.S. economic performance.<sup>1</sup> The “bonus” depreciation rate was increased to 50 percent briefly in 2003 and, in 2008, returned to 50 percent to counter the economic downturn.<sup>2</sup> As the downturn deepened, the 50 percent rate was increased to 100 percent in 2010 through 2011<sup>3</sup> and returned to 50 percent through 2014.<sup>4</sup>

The 2015 legislation,<sup>5</sup> in a major shift, extended the “bonus” rules at the 50 percent level for 2015 through 2017, at 40 percent in 2018 and at 30 percent in 2019. There is presently no authority for claiming “bonus” depreciation after 2019 unless the provision is reinstated.

The 2015 legislation broadened the eligibility for “bonus” depreciation to include “qualified improvement property” and also permits certain trees, vines and plants bearing fruits and nuts to be eligible for “bonus” depreciation but does not extend the “bonus” deduction rules to windbreaks and other instances where trees, vines and plants may be planted.<sup>6</sup>

### Reference to “plants”

The reference to “plants” has raised questions as to how the “bonus” depreciation deduction is to be calculated. Note, however, that the phase-out for “bonus” depreciation applies to plants as well as other eligible property under the 2015 legislation.<sup>7</sup>

The statute<sup>8</sup> states as follows as to eligibility for “bonus” depreciation for “specified plants” –

In the case of any specified plant which is planted before January 1, 2020, or is grafted before such date to a plant that has already been planted, by the taxpayer in the ordinary course of the taxpayer’s farming business (as defined in section 263A(e) (4)) during a taxable year for which the taxpayer has elected the application of this paragraph –

- (i) A depreciation deduction equal to 50 percent of the adjusted basis of such specified plant shall be allowed under section 167(a) for the taxable year in which such specified plant is so planted or grafted, and
- (ii) The adjusted basis of such specified plant shall be reduced by the amount of such deduction.

\* Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar.

The statute<sup>9</sup> goes on to state “. . . the term “specified plant” means –

- (i) Any tree or vine which bears fruits or nuts, and
- (ii) Any other plant which will have more than one yield of fruits or nuts and which generally has a preproductive period of more than 2 years from the time of planting or grafting to the time at which plant begins bearing fruits or nuts.

Such term shall not include any property which is planted or grafted outside of the United States.

**So it appears that the key is “adjusted basis” in figuring the deduction**

It appears that the question of how to handle capitalized expenditures depends upon the accounting rules the taxpayer is following, in terms of what is “adjusted basis.” That is the key issue here. If that is the case, the taxpayer should be prepared to defend their accounting on that issue. The statutory language provides little advice. Final regulations, if issued, should deal with that issue. Until regulations or a ruling or rulings are issued, the best advice is to review the accounting practices being followed in terms of all costs that are to be capitalized up to the time the

“adjusted basis” must be determined.

**ENDNOTES**

<sup>1</sup> Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 101(a), 116 Stat. 40 (2002).

<sup>2</sup> Pub. L. No. 110-185, § 103, 122 Stat. 613 (2008).

<sup>3</sup> Pub. L. No. 111-312, 124 Stat. 3296 (2010).

<sup>4</sup> The Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010 (2014).

<sup>5</sup> Protecting Americans from Tax Hikes Act of 2016 (PATH), Pub. L. No. 114-113, § 143, 129 Stat. 2242 (2015).

<sup>6</sup> I.R.C. § 168(k)(5).

<sup>7</sup> I.R.C. § 168(k)(5).

<sup>8</sup> I.R.C. § 168(k)(5).

<sup>9</sup> I.R.C. § 168(k)(5)(B).

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## CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

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### FEDERAL FARM PROGRAMS

**ORGANIC FOOD.** The AMS has issued proposed regulations which address recommendations submitted to the Secretary of Agriculture by the National Organic Standards Board following their October 2015 meeting. These recommendations pertain to the 2017 Sunset Review of substances on the USDA National List of Allowed and Prohibited Substances. Consistent with the recommendations from the NOSB, this proposed rule would remove eleven substances from the National List for use in organic production and handling: lignin sulfonate, furosemide, magnesium carbonate, Chia, dillweed oil, frozen galangal, inulin, frozen lemongrass, chipotle chile peppers, turkish bay leaves, and whey protein concentrate. **82 Fed. Reg. 5431 (Jan. 18, 2017).**

The AMS has adopted as final regulations which amend the organic livestock and poultry production regulations by adding new provisions for livestock handling and transport for slaughter and avian living conditions, and expanding and clarifying existing requirements covering livestock health care practices and mammalian living conditions. Specifically, the regulations: (1) clarify how producers and handlers must treat livestock and poultry to ensure their health and wellbeing; (2) clarify when and how certain physical alterations may be performed on

organic livestock and poultry in order to minimize stress; (3) set maximum indoor and outdoor stocking density for avian species, which would vary depending on the type of production and stage of life; (4) define outdoor access to exclude the use of structures with solid roofing for outdoor access and require livestock and poultry to have contact with soil; (5) add new requirements for transporting livestock and poultry to sale or slaughter; and (6) clarify the application of FSIS requirements regarding the handling of livestock and poultry in connection with slaughter to certified organic livestock and poultry establishments and provide for the enforcement of USDA organic regulations based on FSIS inspection findings. **82 Fed. Reg. 7042 (Jan. 19, 2017).**

**PLANT PESTS.** The APHIS has re-issued proposed regulations which revise the regulations regarding the movement of plant pests by adding risk-based criteria for determining the plant pest status of organisms, establishing a notification process that could be used as an alternative to the current permitting system, and providing for the environmental release of organisms for the biological control of weeds. The proposed changes clarify the factors that would be considered when assessing the plant pest risks associated with certain organisms and facilitate the importation and interstate movement of regulated organisms. The new proposed regulations replace proposed regulations issued in 2001, 66 Fed. Reg. 51340 (Oct. 9, 2001). **82 Fed. Reg. 6980 (Jan. 19, 2017).**