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DEFENDER

The National Association of Dealer Counsel Newsletter — MARCH 2012

In this Issue:

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IRS Alters Tax Treatment of Image Enhancement Programs

By Wayne Robbins, Dixon Hughes Goodman LLP

Tax Alert!

Over the past several years, most automobile manufacturers have requested, or even required, that their franchised dealers invest in their facilities to enhance the manufacturers' image. The extent of the required improvements is significant for many dealers, which means big money going out the door! The accounting and tax treatment for these costs have varied from dealer to dealer, with some dealers capitalizing the costs while others elected to expense the improvements in the year they were made. Well, on December 23, 2011, the Treasury Department and the Internal Revenue Service (IRS) released the much anticipated capital expenditures regulations in temporary and proposed form (the "temporary regulations"). These temporary regulations contain the standards for determining when a taxpayer must capitalize costs incurred in acquiring, maintaining, or improving tangible property and are significantly different than the regulations previously proposed in 2008 (2008 regulations).

So, why is this important? Simple, **MONEY**!! Repairs and maintenance are expensed in the year incurred thus reducing the taxpayer's taxable income. Those items that meet the temporary regulation's definition for capitalization must be depreciated over the life of the related asset, which means the taxpayer has to wait anywhere from 5 to 39 years to get the full tax benefit of the expense.

These regulations affect almost all automobile dealerships in one form or another. In the paragraphs below we will discuss the significant issues of the temporary regulations and the impact they have on our dealership clients. Specifically, we will discuss the following:

- Changes in Method of Accounting
- Improvement to Tangible Property
- Unit of Property Definition
- Dispositions
- Routine Maintenance Safe Harbor

The new temporary regulations significantly change the rules for determining whether expenditures are capital improvements or ordinary repairs.

Changes in Method of Accounting

The temporary regulations are generally effective for tax years beginning on or after January 1, 2012. All taxpayers that acquire, produce or improve tangible property will likely have to change their method of accounting to conform to the temporary regulations. Taxpayers effect this change by filing Form 3115 - Change in Accounting Method, with the IRS. Taxpayers that currently use a more favorable method of accounting for repairs and maintenance than permitted under the new temporary regulations will likely have to make an adjustment when the change in accounting method is filed for the 2012 tax year. This adjustment may reverse some the income tax benefit obtained from the previous accounting method utilized, which means additional income tax may be owed.

Improvement to Tangible Property

The new temporary regulations significantly change the rules for determining whether expenditures are capital improvements or ordinary repairs. Under the temporary regulations, the determination whether an amount is paid for the replacement of a part or a combination of parts that comprise a major component or a substantial structural part of the unit of property will be facts and circumstances based. The 2008 proposed regulations defined replacement of a major component or substantial structural part to mean either:

- costs that comprise 50 percent or more of the replacement costs of the unit of property; or
- replacement of 50 percent or more of the physical structure of the unit of property.

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The new temporary regulations require that the taxpayer consider all facts and circumstances, including the quantitative or qualitative significance of the part or combination of parts in relation to the unit of property. The temporary regulations provide that a major component or substantial structural part includes:

- "a large portion" of the physical structure of the unit of property, or
- a part or combination of parts that perform a discrete and critical function in the operation of the unit of property that is more than "a minor component."

The temporary regulations contain several examples to illustrate the rules. Included are examples of costs related to the structural components of a roof, roof membrane, HVAC system, fire protection system, electrical system, plumbing system, windows and floors. The examples illustrate that the determination of whether costs are required to be capitalized depends on the nature and extent of the costs relative to the property.

The temporary regulations also provide taxpayers with guidance on the treatment of amounts paid to improve tangible property. The temporary regulations require a taxpayer to capitalize amounts paid to improve a unit of property if the amount:

- results in a betterment to the unit of property;
- results in a restoration to the unit of property; or
- adapts the unit of property to a new or different use.

Betterments

In general, the temporary regulations provide that an amount would result in a betterment if it:

- ameliorates a material condition or defect that either existed prior to the taxpayer's acquisition of the unit of property or arose during the production of the unit of property, whether or not the taxpayer was aware of the condition or defect at the time of the acquisition or production;
- results in a material addition (including a physical enlargement, expansion, or extension) to the unit of property; or
- results in a material increase in capacity (including additional cubic or square feet), productivity, efficiency, strength, or quality of the unit of property or the output of the unit of property.

The rules in the temporary regulations for determining whether an amount results in a betterment to a unit of property include one major change. The temporary regulations specifically provide that an amount should be capitalized if it results in a betterment to a structural component or a building system, instead of to the building as a whole (see Unit of Property Discussion). It is important to carefully weigh the facts and circumstances of each repair when determining if it meets the criteria for a betterment.

Restorations

The temporary regulations generally retain the restoration standards provided in the 2008 proposed regulations. The temporary regulations provide that an amount is paid to restore, and therefore improve, a unit of property if it:

- Is for the replacement of a component of a unit of property and the taxpayer has properly deducted a loss for that component (other than a casualty loss under Reg. §1.165-7);
- Is for the replacement of a component of a unit of property and the taxpayer had properly taken into account the adjusted basis of the component in realizing gain or loss resulting from the sale or exchange of the component;
- Is for the repair of damage to a unit of property for which the taxpayer has properly taken a basis adjustment as a result of a casualty loss under code §165, or relating to a casualty event described in code §165;
- Returns the unit of property to its ordinarily efficient operating condition if the property has deteriorated to a state of disrepair and was no longer functional for its intended use;
- Results in the rebuilding of the unit of property to a like-new condition after the end of its economic useful life; or
- Is for the replacement of a major component or a substantial structural part of the unit of property.

Adaption to a New or Different Use

The temporary regulations maintain the rules provided in the 2008 proposed regulations that taxpayers must capitalize amounts paid to adapt a unit of property to a new or different use. Facts and circumstances will be used to properly determine whether an amount must be capitalized because it is paid to adapt a unit of property to a new or different use.

Unit of Property

The definition of "unit of property" is very important for any "repairs" study because it serves as a pivotal reference point when the capitalization rules are applied. Generally, the larger the unit of property, the more likely the capitalization rules will result in amounts paid being treated as a deductible repair. In general the temporary regulations define "unit of property" as all components that are functionally interdependent comprising a single unit of property. Components of property are functionally interdependent if the placing in service of one component by the taxpayer is dependent on the placing in service of the other component by the taxpayer. For buildings and their structural components the temporary regulations provide the following expanded definitions.

Buildings and Structural Components

The temporary regulations retain the general rule from the 2008 proposed regulations defining the unit of property for buildings as the building and its structural components. However, the temporary regulations make significant modifications to the application of the improvement standards to buildings as compared to the 2008 proposed regulations. The temporary regulations now require that a taxpayer apply the improvement standards separately to the building (including its structural components) and to any specifically defined "building system" (as described below).

The temporary regulations define building systems to include:

- heating, ventilation and air conditioning (HVAC) systems;
- plumbing systems;
- electrical systems;
- escalators;
- elevators;
- fire protection and alarm systems;
- security systems; and
- gas distribution systems.

Therefore, if a repair is an improvement relative to a defined building component or building system, it must be treated as an improvement to the entire building, and thus capitalized as opposed to expensed.

Dispositions

The temporary regulations include new provisions under code §168 that expand the definition of dispositions to include the retirement of a structural component of a building. This change allows a taxpayer to recognize a loss on the disposition of a structural component of a building before the disposition of the entire building so that a taxpayer will not have to continue to depreciate amounts allocable to structural components that are no longer in service.

The temporary regulations provide that the facts and circumstances of each disposition are to be considered in determining the appropriate disposed asset. In general, the asset for disposition purposes cannot be larger than the applicable unit of property.

Routine Maintenance Safe Harbor

The 2008 proposed regulations provided a safe harbor from capitalization for the costs of performing certain routine maintenance activities. Under the safe harbor, an amount paid was deemed not to improve the unit of property if it was for the ongoing activities that a taxpayer expected to perform as a result of the taxpayer's use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. Routine maintenance activities include inspections, cleaning and testing of the unit of property, and the replacement of parts with comparable and commercially available and reasonable replacement parts. The temporary regulations revised the routine maintenance safe harbor to apply only to property other than a building or a structural component of a building.

As you can see, the temporary regulations are complex and may result in significant changes for taxpayers and how they account for capital expenditures. Encourage your clients to discuss these issues with their tax professional to properly assess and implement the new changes. ■

For more information contact your Dixon Hughes Goodman tax professional or Wayne Robbins at wayne.robbins@dhgllp.com or 919.876.4546.

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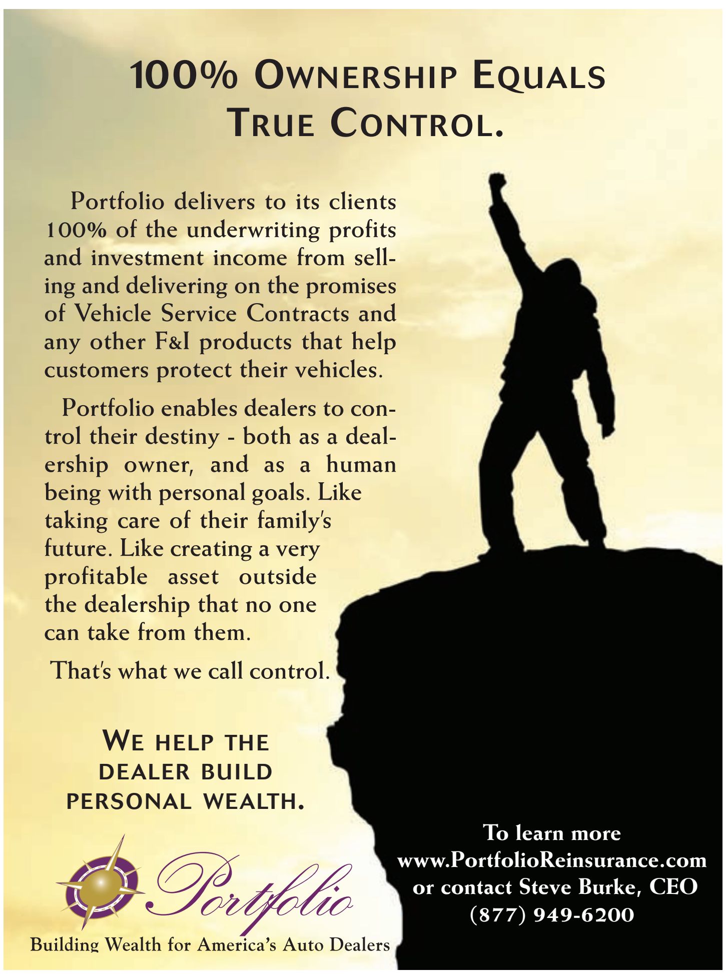

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March Madness!

Erin H. Murphy
NADC Executive Director

We want to hear from you NADC!
In the spirit of March Madness, to quote legendary basketball coach Bobby Knight,

"Everybody hears, but few listen."
We are listening, friends!

One of the most valuable benefits of NADC membership is the ability to learn from one another. You are the players out on the court. You have the ideas, expertise, best practices and war stories from which the rest of the membership can benefit. This is why we strongly encourage all members to submit articles for publication in *The Defender.* Please send your contributions or article proposals to:

mike.charapp@cwattorneys.com or emurphy@dealercounsel.com .

Do you have ideas for webinars or session topics at our semi-annual conferences that you think could be a slam dunk? Whether you would like to propose conducting a webinar or presenting at a meeting; or if there is a topic you would like to see covered, give us an assist and pass along your ideas.

Additionally, we hope you will join us at the 8th Annual NADC Member Conference being held April 29 – May 1, 2012 at the Hyatt Regency Scottsdale Resort and Spa at Gainey Ranch. The conference will be a two day program designed to provide you with updates, best practices, lessons learned and other useful information. The planning committee has prepared a great agenda and you will be sure to take home valuable tools that will benefit you and your clients. Please check the website www.dealercounsel.com for a detailed agenda in the "Events" section.

NADC is dedicated to continuing to provide valuable networking and educational opportunities in 2012. We strive to be an indispensable resource for your auto dealer practice and thus we are always open to your feedback. Please do not hesitate to share with us your thoughts on how we can make NADC more beneficial. Let's work together as a team!

I will stop the barrage of basketball clichés, but remember you are our Most Valuable Player. For the record, I picked UNC to win in the bracket – only because my beloved Richmond Spiders did not make it to the Dance this year.

"Talent wins games, but teamwork and intelligence winschampionships."
Michael Jordan

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The FTC is Coming

By Johnnie Brown, Pullin, Fowler & Flanagan, PLLC

Feature Article

At our October 2011 semi-annual NADC Conference, I did not realize how prophetic the remarks of Paul Metrey and Andy Koblenz of the National Automobile Dealers Association would be. Both explained that the Federal Trade Commission's enforcement budget had been greatly increased by the Obama Administration and how enforcement could increase because of the creation of the Consumer Financial Protection Bureau. They suggested that no new laws appeared to be forthcoming, but that a new era of enforcement may exist because of increased budget monies.

Within a week of returning to the office, I received a phone call from a client fulfilling that prophecy. As you may well know, on March 14, 2012, the Federal Trade Commission posted four negotiated consent decrees involving dealerships across the country. My client happened to be one of those unfortunate few. However, rather than provide you with a legal analysis of the rules of procedure before the Federal Trade Commission or advertising, I thought I would provide the Association members with a few points of observation from this experience.

In this fast paced internet world, dealerships can more readily reach their customers through Facebook, YouTube, Twitter, etc. Because of the new advertising media, the Federal Trade Commission can more easily monitor dealership advertising across the country. Internet ads makes it quite easy for a Federal Trade Commission attorney to sit in his or her Washington office and surf the web evaluating your client's advertisements on YouTube or Facebook. The Federal Trade Commission's four consent agreements appear to be based upon internet ads. My client's advertisements were all on the internet.

Your client may have great CSI scores and may think that no customer would ever complain about it to Federal Trade Commission. However, a consumer complaint is not required. There were no consumer complaints against my client to cause the Federal Trade Commission complaint. A Federal Trade Commission investigator apparently surfed onto my client's ads on YouTube and Facebook. This could happen to any dealership across the country, since social media advertising has become part of how most dealers do business. The Federal Trade Commission does not have to wait for consumer complaints, and now it has a larger enforcement budget that it must justify. Part of the FTC mission is to protect the public against "misleading" and "deceptive" advertising. Injury or complaints are not required. The ad itself that an FTC investigator believes may violate the law is sufficient.

I encourage all counsel to discuss with their clients that advertising disclaimers which may be proper in one advertising medium may not be in another. For example, a disclaimer or explanation after a "trigger term" is used may be very clear and conspicuous on a television ad, but once that television ad is transferred to YouTube, Facebook or other social media video, the resolution changes greatly. The mere change of medium can make a seemingly compliant ad non-compliant. Nevertheless, our dealers have the responsibility to make sure that disclaimers are proper regardless of the advertising medium used. Advertising agencies also need to realize this.

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The days of delaying responses and avoiding action with Federal Trade Commission complaints are over. The Commission was very aggressive in pursuing the consent agreement, with the threat that the alternative was to have the dealer face a complaint before the Federal Trade Commission. Agency lawyers demanded answers in two weeks, not months. Extensive document production was requested, but not required. The leverage used was that the dealer settle with the agency, or the request will turn into a demand once litigation starts. This required a prompt analysis of my client's records to determine if more problems were present. I strongly suspect that before the Federal Trade Commission forwards a complaint, similar to a United States Attorney issuing an indictment, the lawyers already feel that the agency has a strong legal position against your client.

The Federal Trade Commission was very firm in its negotiations and not willing to negotiate on substantive terms. You will read in the consent decrees released on March 14, 2012 that the agreement lasts for twenty years. This seems like an eternity in our client's world, but prior Federal Trade Commission orders had no expiration date. I would submit that such a period of time is simply unrealistic, but repeated efforts to reduce this time frame were met with prompt rejection. In fact, it should be noted that all the consent decrees are nearly identical except for a minor negotiation on behalf of my client which allowed us additional time to respond to future inquires.

If your client finds itself in this position, it must be prepared for the coming negative publicity. Before the consent decree is made public, preparations must begin on how to respond to inquires from local press sources. The Federal Trade Commission's news release to the Associated Press and others will be picked up in your client's area and published in the local newspaper. Phone calls then begin to the dealership. A cohesive and consistent message must be prepared to convey the dealership's position and intentions in entering into the consent agreement. Simply saying "no comment" does not work.

Don't assume that the client's advertising agency or a manufacturer's advertisements are correct. In my client's case, the ads were reviewed by a well known national advertising agency, and in one instance, a top manufacturer. Likewise, I encourage counsel to review their advertising contracts and to make sure there is specific reference to compliance obligations, and indemnity when legal obligations are not met by the advertising agency.

Some dealers simply do not pay enough attention to advertising because everyone around them is usually doing the same thing. Our clients have also been doing the same thing for years, or even decades, with no problems. Having to explain to a client why they are being targeted when every other dealer is doing the same type of advertising can be quite a challenge. It reminds me of a driver complaining to an officer when getting a speeding ticket, "why did you pull me over, cars were passing me." We all understand that other people's actions do not negate one's own legal obligations to comply with the posted traffic laws, or in this case advertising laws. This can be a hard pill to swallow, and perhaps it may even lead to a competitive disadvantage when other dealers keep advertising with the same old slogans and programs.

Our dealers need more training on advertising compliance. Do they appreciate "trigger terms" applicable for finance purchases and leasing, and how to avoid or handle advertising about negative equity? The Federal Trade Commission's press release focused on "negative equity" advertising, but the March 12 consent agreements also addressed "trigger terms." Despite the fact that the Federal Trade Commission released guidance on negative equity back in the late 1990's, some dealers appear to be stuck in the 1970's with their advertising slogans. However, what has changed now is that compliance checks are made easy with internet advertising. Obviously, advertising compliance is easy to spot check from any computer in the world. Also, concepts of "net impression," "substantiation," and "deception" are terms about which dealers should have a working knowledge.

I hope that my experience and observations can assist you in representing your clients more proactively and to better prepare when facing this seemingly new era of Federal Trade Commission enforcement against the automobile dealers. And, I do plan to ask Paul Metrey and Andy Koblenz if they have any suggestions for lottery numbers the next time they are in the mood to provide predictions. ■

Johnnie Brown is an equity member with the firm of Pullin, Fowler & Flanagan PLLC in Charleston, WV.

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