Simon v. Comm'r

103 T.C. 247; 1994 U.S. Tax Ct. LEXIS 60; 103 T.C. No. 15

August 22, 1994, Filed

JUDGES: Laro, *Judge*. Parker, Swift, Wright, Parr, Wells, Ruwe, and Colvin, *JJ.*, agree with this majority opinion. Chiechi, *J.*, dissents. Ruwe, *J.*, concurring. Parker, Cohen, Swift, Wright, Parr, Wells, and Beghe, *JJ.*, agree with this concurring opinion. Beghe, *J.*, concurring. Hamblen, *C.J.*, dissenting. Chabot, Jacobs, Whalen, and Halpern, *JJ.*, agree with this dissent. Gerber, *J.*, dissenting. Halpern, *J.*, dissenting. Hamblen, Jacobs, and Whalen, *JJ.*, agree with this dissent.

OPINION

[*248] Laro, *Judge:* Richard Simon and Fiona Simon petitioned the Court for a redetermination of respondent's determinations in a notice of deficiency issued to them on December 11, 1991. In the notice respondent determined a $ 21,198 deficiency in petitioners' 1989 Federal income tax and a $ 4,240 addition thereto under *section 6662(a) of the Internal Revenue Code* in effect for 1989. Unless otherwise indicated, section references are to the Internal Revenue Code in effect for 1985. See *infra* note 3. Rule references are to the Tax Court Rules of Practice and Procedure.

Due to concessions by the parties, the sole issue for decision is whether petitioners are entitled to deduct depreciation claimed under the accelerated cost recovery system (ACRS) for the year in issue. [1] Petitioners claimed depreciation on two 19th-century violin bows that they used in their trade or business as full-time professional violinists. As discussed below, we hold that petitioners may depreciate their violin bows during the year in issue.

1 On Sept. 16, 1993, the parties filed a stipulation of settled issues that resolved all issues in the case except the depreciation issue mentioned above.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulations and attached exhibits are incorporated herein by this reference. For the taxable year in issue, petitioners were husband and wife and filed a 1989 Form 1040, U.S. [*249] Individual Income Tax Return, using the status of "Married filing joint return". When they filed their petition in this case, petitioners resided in New York, New York.

Petitioners' Backgrounds

Richard Simon started playing and studying the violin in 1943, at the age of 7. In 1945, he was awarded a full scholarship to the Manhattan School of Music. He studied the violin there through college and received a bachelor of music degree in 1956. Following his graduation, Richard Simon pursued a master's degree in music by taking additional courses at the Manhattan

School of Music and Columbia University. Throughout his education, Richard Simon studied the violin under many renowned musicians.

In 1965, Richard Simon joined the New York Philharmonic Orchestra (orchestra) and began playing in its first violin section. In 1981, he joined and began playing with the New York Philharmonic Ensembles (ensembles) (hereinafter, the orchestra and the ensembles are collectively referred to as the Philharmonic). Since 1965, Richard Simon has maintained two careers, one as a player with the orchestra (and later with the Philharmonic) and the second as a soloist, chamber music player, and teacher.

Fiona Simon began playing and studying the violin at the age of 4. Her musical studies included courses at Purcell School in London from 1963-71 and at the Guildhall School of Music from 1971-73. Throughout her career, Fiona Simon studied the violin with renowned musicians.

In 1985, Fiona Simon joined the Philharmonic and began playing in its first violin section. Since 1985, Fiona Simon has maintained two careers, one as a full-time player with the Philharmonic and a second as a soloist, chamber music player, teacher, and free-lance performer.

During the year in issue, petitioners were both full-time performers with the Philharmonic, playing locally, nationally, and internationally in the finest concert halls in the world. In 1989, petitioners performed four concerts per week with the Philharmonic, playing over 200 different works, and attended many rehearsals with the Philharmonic that were more demanding and more time-consuming than the concerts. [*250] Petitioners also carried out the busy schedules connected with their second careers.

Construction of a Violin Bow

A violin bow consists of a flexible wooden stick, horsehair, a frog, and a ferrule (screw). The stick, which varies in thickness, weight, and balance, is the working part of the bow and is an integral part in the production of sound through vibration. It is designed so that horsehair can be stretched between its ends.

The horsehair is a group of single strands of hair that come from the tails of Siberian horses. A hatchet-shaped head holds one end of the horsehair, and the other end is attached to a frog. The frog, which is inserted into the stick, is a movable hollow piece by which the bow is held. The frog has an eyepiece on the end that catches the screw. The screw is the small knob at the end of the bow that is adjusted to tighten or loosen the horsehair in order to change the tension on the horsehair. The horsehair is the part of the bow that touches the violin strings. Rosin is applied to the horsehair to supply the frictional element that is necessary to make the violin strings vibrate.

Old violins played with old bows produce exceptional sounds that are superior to sounds produced by newer violins played with newer bows. The two violin bows in issue were made in the 19th century by François Xavier Tourte (1747-1835). François Tourte is considered the premier violin bow maker. In particular, he is renowned for improving the bow's design. (Hereinafter, the two bows in issue are separately referred to as bow 1 and bow 2, and are collectively referred to as the Tourte bows.)

Purchase of the Tourte Bows

On November 13, 1985, petitioners purchased bow 1 for $ 30,000; the bow was purchased from Moes & Moes, Ltd., a dealer and restorer of violins and violin bows. On December 3, 1985, petitioners purchased bow 2 from this dealer for $ 21,500. The sticks, frogs, and screws were originals of François Tourte at the time of each purchase. No cracks or other defects were

apparent in the sticks at the time of each [*251] purchase. The frogs and screws, however, were not in playable condition. Therefore, petitioners replaced them.

Petitioners acquired the Tourte bows for regular use in their full-time professional employment as violinists. Petitioners purchased the Tourte bows for their tonal quality, not for their monetary value. [2] In the year of acquisition, petitioners began using the Tourte bows with the original sticks in their trade or business as full-time professional violinists. Petitioners continued to use the Tourte bows with the original sticks during the year in issue.

2 Richard Simon plays a violin made by Nicolo Amati in 1660. Fiona Simon plays a violin made circa 1750. The combination of these old violins and the Tourte bows results in a magnificent sound that is superior to the sounds produced by newer instruments.

Depreciation Deductions Claimed for the Tourte Bows

On their 1989 Form 1040, petitioners claimed a depreciation deduction of $ 6,300 with respect to bow 1 and $ 4,515 with respect to bow 2; these amounts were in accordance with the appropriate ACRS provisions that applied to 5-year property. See *sec. 168(b)(1)*. [3] Respondent disallowed petitioners' depreciation deduction in full and reflected her disallowance in the notice of deficiency at issue here.

3 Because the Tourte bows were placed in service in 1985, the Internal Revenue Code applicable to that year governs the computation of depreciation for the taxable year in issue. *Sec. 168(b)(1)*; see also Tax Reform Act of 1986 (TRA), Pub. L. 99-514, secs. 201(a), 203(a)(1), 100 Stat. 2085, 2121, 2143 (in general, TRA amended *sec. 168* effective for property placed in service after Dec. 31, 1986, in taxable years ending after that date).

Conditions Affecting the Wear and Tear of Violin Bows

Playing with a bow adversely affects the bow's condition; when a musician plays with a bow, the bow vibrates up, down, sideways, and at different angles. In addition, perspiration from a player's hands enters the wood of a bow and ultimately destroys the bow's utility for playing. Cracks and heavy-handed bearing down while playing certain pieces of music also create wear and tear to a bow. A player who has a heavy hand may cause the stick to press against the horsehair; in turn, this may cause the bow to curve and warp. The appendix illustrates the wear and tear that was suffered by a violin bow that was used for 20 to 25 years. [4] [*252] Petitioners' use of the Tourte bows during the year in issue subjected the bows to substantial wear and tear.

4 The appendix (petitioners' Exhibit 15) is not one of the Tourte bows. The appendix is provided to show the nature of the types of wear and tear that a bow can suffer. The large indentation at the bottom of the stick immediately before the frog was caused by perspiration and pressure from the player's thumb. See 1 *infra* the appendix. Further down the stick towards the right is a second indentation that was caused by perspiration and pressure from the player's hand. See 2 *infra* the appendix.

Frequent use of a violin bow will cause it to be "played out", meaning that the wood loses it ability to vibrate and produce quality sound from the instrument. From the point of view of a professional musician, a "played out" bow is inferior and of limited use. The Tourte bows were purchased by petitioners, and were playable by them during the year in issue, only because the Tourte bows were relatively unused prior to petitioners' purchase of them; the Tourte bows had been preserved in pristine condition in collections. [5] At the time of trial, the condition of the

Tourte bows had deteriorated since the dates of their purchase. Among other things, the sticks on the Tourte bows were worn down.

5 Indeed, bow 1 had never been used prior to petitioners' purchase of it. According to its certificate of authenticity, bow 1 was made by François Tourte about 1810 to 1820. Thus, it was approximately 175 years old when petitioners purchased it.

Value of the Tourte Bows

On November 21, 1985, bow 1 was appraised for insurance purposes as having a fair market value of $ 35,000. On December 3, 1985, bow 2 was appraised for insurance purposes as having a fair market value of $ 25,000. Petitioners obtained both appraisals from Moes & Moes, Ltd.

In 1994, at the time of trial, the Tourte bows were insured with the Philharmonic for $ 45,000 and $ 35,000, respectively. These amounts are based on an appraisal dated May 14, 1990, from Yung Chin Bowmaker, a restorer and dealer of fine bows. The record does not indicate whether these appraised amounts were the fair market values of the Tourte bows or were their replacement values.

An independent market exists for the Tourte bows and other antique bows. Numerous antique bows (including bows made by François Tourte) are regularly bought and sold in this market. The Tourte bows are unadorned; they are not as lavish or decorative as some other bows (including other bows made by François Tourte) that are sold in the independent market. Adornments on other bows include engravings, gold, silver, ivory, and mother-of-pearl.

[*253] One factor that adds value to the Tourte bows is the fact that Pernambuco wood, the wood that was used to make the sticks, is now very scarce. The wood that is currently used to make the sticks of violin bows is inferior to Pernambuco wood.

OPINION

The burden of proof is on petitioners to show that respondent's determinations set forth in her notice of deficiency are incorrect. Rule 142(a); *Welch v. Helvering, 290 U.S. 111, 115 (1933)*. The issue that we must decide is whether petitioners are entitled to deduct depreciation under ACRS with respect to the Tourte bows.

Taxpayers have long been allowed asset depreciation deductions in order to allow them to allocate their expense of using an income-producing asset to the periods that are benefited by that asset. The primary purpose of allocating depreciation to more than 1 year is to provide a more meaningful matching of the cost of an income-producing asset with the income resulting therefrom; this meaningful match, in turn, bolsters the accounting integrity for tax purposes of the taxpayer's periodic income statements. *Hertz Corp. v. United States, 364 U.S. 122, 126 (1960)*; *Massey Motors, Inc. v. United States, 364 U.S. 92, 104 (1960)*. Such a system of accounting for depreciation for Federal income tax purposes has been recognized with the approval of the Supreme Court for over 65 years; as the Court observed in 1927: "The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it." *United States v. Ludey, 274 U.S. 295, 301 (1927)*; see also *Massey Motors, Inc. v. United States, supra at 104*. In this sense, an allocation of depreciation to a given year represents that year's reduction of the underlying asset through wear and tear. *United States v. Ludey, supra at 300-301*. Depreciation allocations also represent a return to the taxpayer of his or her investment in the income-producing property over the years in which depreciation is allowed. *Virginian*

Hotel Corp. v. Helvering, 319 U.S. 523, 528 (1943); *Detroit Edison Co. v. Commissioner, 319 U.S. 98, 101 (1943).*

Prior to the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. 97-34, 95 Stat. 172, personal property was depreciated [*254] pursuant to *section 167 of the Internal Revenue Code of 1954* (1954 Code). *Section 167(a)* provided:

> *SEC. 167(a).* General Rule. -- There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) --
>
> (1) of property used in the trade or business, or
>
> (2) of property held for the production of income.

The regulations under this section expanded on the text of *section 167* by providing that personal property was only depreciable before ERTA if the taxpayer established the useful life of the property. See *sec. 1.167(a)-1(a)* and *(b), Income Tax Regs.*

The "useful life" of property under pre-ERTA law was the period over which the asset could reasonably be expected to be useful to the taxpayer in his or her trade or business, or in the production of his or her income. *Fribourg Navigation Co. v. Commissioner, 383 U.S. 272, 277 (1966)*; *Massey Motors, Inc. v. United States, supra; sec. 1.167(a)-1(b), Income Tax Regs.* This useful life period was not always the physical life or maximum useful life inherent in the asset. *Massey Motors, Inc. v. United States, supra; sec. 1.167(a)-1(b), Income Tax Regs.* A primary factor to consider in determining an asset's useful life was any "wear and tear and decay or decline from natural causes" that was inflicted upon the asset. *Sec. 1.167(a)-1(b), Income Tax Regs.*

Before ERTA, the primary method that was utilized to ascertain the useful life for personal property was the asset depreciation range (ADR) system. Under the ADR system, which was generally effective for assets placed in service after 1970 and before 1981, property was grouped into broad classes of industry assets, and each class was assigned a guideline life. See, e.g., *sec. 1.167(a)-11, Income Tax Regs.*; *Rev. Proc. 83-35, 1983-1 C.B. 745*, superseded by *Rev. Proc. 87-56, 1987-2 C.B. 674*; see also ERTA sec. 209(a), 95 Stat. 226. A range of years, i.e., the ADR, was then provided for each class of personal property; the ADR extended from 20 percent below to 20 percent above the guideline class life. For each asset account in the class, the taxpayer selected either a class life or an ADR that was utilized as the useful life for computing depreciation. See, e.g., *sec. 1.167(a)-11(a), Income Tax Regs.*; *Rev. Proc. 83-35, supra*. If an asset was not [*255] eligible for ADR treatment, or if the taxpayer did not elect to use the ADR system, the useful life of that asset was generally determined based on either the particular facts and circumstances that applied thereto, or by agreement between the taxpayer and the Commissioner. *Massey Motors, Inc. v. United States, supra; sec. 1.167(a)-1(b), Income Tax Regs.* See generally Staff of Joint Comm. on Taxation, General Explanation of the Economic Recovery Tax Act of 1981, at 67 (J. Comm. Print 1981) (hereinafter referred to as the 1981 Bluebook).

In enacting ERTA, the Congress found that the pre-ERTA rules for determining depreciation allowances were unnecessarily complicated and did not generate the investment incentive that was critical for economic expansion. The Congress believed that the high inflation rates prevailing at that time undervalued the true worth of depreciation deductions and, hence, discouraged investment and economic competition. The Congress also believed that the

determination of useful lives was "complex" and "inherently uncertain", and "frequently [resulted] in unproductive disagreements between taxpayers and the Internal Revenue Service." S. Rept. 97-144, at 47 (1981), *1981-2 C.B. 412, 425*. See generally 1981 Bluebook, at 75. Accordingly, the Congress decided that a new capital cost recovery system would have to be structured which, among other things, lessened the importance of the concept of useful life for depreciation purposes. S. Rept. 97-144, *supra at 47, 1981-2 C.B. at 425*. See generally 1981 Bluebook, at 75. This new system is ACRS. ACRS is mandatory and applies to most tangible depreciable assets placed in service after 1980 and before 1987. ERTA sec. 209(a), 95 Stat. 172; see also Tax Reform Act of 1986, Pub. L. 99-514, secs. 201(a), 203(a)(1), 100 Stat. 2085, 2121, 2143.

The rules implementing ACRS were prescribed in *section 168*. According to the relevant parts of this section, as added to the 1954 Code by ERTA:

> *SEC. 168(a).* Allowance of Deduction. -- There shall be allowed as a deduction for any taxable year the amount determined under this section with respect to recovery property.[6]
>
> [*256] (b) Amount of Deduction. --
>
> (1) In general. -- Except as otherwise provided in this section, the amount of the deduction allowable by subsection (a) for any taxable year shall be the aggregate amount determined by applying to the unadjusted basis of recovery property the applicable percentage determined in accordance with the following tables:
>
> * * *
>
> (B) For property placed in service in 1985.[7] –
>
> *The applicable percentage for the class of property is:*

If the recovery year is:	3-year	5-year	10-year	15-year public utility
1	29	18	9	6
2	47	33	19	12
3	24	25	16	12
4		16	14	11
5		8	12	10
6			10	9
7			8	8
8			6	7
9			4	6
10			2	5
11				4
12				4
13				3
14				2
15				1

> * * *

(c) Recovery Property. -- For purposes of this title --

(1) Recovery property defined. -- * * * the term "recovery property" means tangible property of a character subject to the allowance for depreciation --

(A) used in a trade or business, or

(B) held for the production of income.

(2) Classes of recovery property. -- Each item of recovery property shall be assigned to one of the following classes of property:

[*257] (A) 3-YEAR PROPERTY. -- The term "3-year property" means *section 1245* class property[8]--

(i) with a present class life of 4 years or less * * *

* * *

(B) 5-YEAR PROPERTY. -- The term "5-year property" means recovery property which is *section 1245* class property and which is not 3-year property, 10-year property, or 15-year public utility property.

(C) 10-YEAR PROPERTY. -- The term "10-year property" means --

(i) [certain] public utility property * * *; and

(ii) [certain] section 1250 class property * * *.

Thus, through ERTA, the Congress minimized the importance of useful life by: (1) Reducing the number of periods of years over which a taxpayer could depreciate his or her property from the multitudinous far-reaching periods of time listed for the ADR system to the four short periods of time listed in ERTA (i.e., the 3-year, 5-year, 10-year, and 15-year ACRS periods), and (2) basing depreciation on an arbitrary statutory period of years that was unrelated to, and shorter than, an asset's estimated useful life. This minimization of the useful life concept through a deemed useful life was in spirit with the two main issues that ERTA was designed to address, namely: (1) Alleviating the income tax problems that resulted mainly from complex depreciation computations and useful life litigation, and (2) responding to economic policy concerns that the pre-ERTA depreciation systems spread the depreciation deductions over such a long period of time that investment in income-producing assets was discouraged through the income tax system. S. Rept. 97-144, *supra at 47, 1981-2 C.B. at 425*. See generally 1981 Bluebook, at 75.

6 *Sec. 167(a)* of the 1954 Code as amended by ERTA, which contains the general rule for depreciation, cross-references *sec. 168* of the 1954 Code as amended by ERTA as follows: "In the case of recovery property (within the meaning of *section 168*), the deduction allowable under *section 168* shall be deemed to constitute the reasonable allowance provided by this section".

7 In addition to the four classes mentioned below, *sec. 168* of the 1954 Code as amended by ERTA provided a fifth class of recovery property known as "15-year real property".

Sec. 168(c)(2)(D) as added to the 1954 Code by ERTA. *Sec. 168(c)(2)(D)* as added to the 1954 Code by ERTA was subsequently amended by sec. 206(a) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 324, 431. This subsequent amendment, in relevant part, changed the applicable percentages for 5-year class property placed in service in 1985, to 15, 22, 21, 21, and 21.

8 The term "*section 1245* class property" generally means personal property that "is or has been property of a character subject to the allowance for depreciation provided in *section 167*". *Secs. 168(g)(3), 1245(a)(3)* of the 1954 Code as amended by ERTA.

With respect to the pre-ERTA requirement of useful life, the Commissioner had initially taken the position that a taxpayer generally could not deduct depreciation on expensive works of art and curios that he purchased as office furniture. See A.R.R. 4530, II-2 C.B. 145 (1923). This position was superseded by a similar position that was reflected in *Rev. Rul. 68-232, 1968-1 C.B. 79*. That ruling states:

> A valuable and treasured art piece does not have a determinable useful life. While the actual physical condition of the property may influence the value placed on the object, it will not ordinarily limit or determine the useful [*258] life. Accordingly, depreciation of works of art *generally* is not allowable. [Emphasis added.]

In the instant case, respondent determined that petitioners were not entitled to deduct depreciation for the Tourte bows. On brief, respondent supports her disallowance with two primary arguments. First, respondent argues that the useful lives of the Tourte bows are indeterminable because the bows are treasured works of art for which it is impossible to determine useful lives. According to respondent, the Tourte bows are works of art because the Tourte bows have existed for more than 100 years and have increased in value over that time; the presence of an independent market for the Tourte bows also gives them a value independent of their capacity to be used to play music, and serves to extend their useful lives indefinitely.

As an alternative to this first argument, respondent argues that the Tourte bows are depreciable under *section 168* only if petitioners first prove that each bow has a determinable useful life within the meaning of *section 167*. In this regard, respondent contends that petitioners must prove a specific or reasonable estimate of the number of years that the Tourte bows will be useful in order to depreciate them under ACRS. Given that the Tourte bows have existed for more than 100 years, respondent concludes, petitioners may not depreciate the Tourte bows because petitioners cannot determine the number of remaining years during which the Tourte bows will continue to be useful.

Petitioners' argument is more straightforward. According to petitioners, they may claim depreciation on the Tourte bows because the Tourte bows: (1) Were necessary to their profession as full-time professional violinists, and (2) suffered wear and tear attributable to their use in that profession. In this regard, petitioners contend, the Tourte bows can be used to produce beautiful sounds superior to those produced by any newer bow, and the Tourte bows harmonize this beautiful music with the reputation of the Philharmonic as one of the most prestigious orchestras in the world.

We agree with petitioners that they may depreciate the Tourte bows under ACRS. ERTA was enacted partially to address and eliminate the issue that we are faced with today, namely, a disagreement between taxpayers and the Commissioner [*259] over the useful lives of assets that were used in taxpayers' trades or businesses. With this "elimination of disagreements" purpose in mind, the Congress defined five broad classes of "recovery property", and provided the periods of years over which taxpayers could recover their costs of this "recovery property".

Two of these classes, the 3-year- and 5-year-classes, applied only to personal property; the 3-year class included certain short-lived assets such as automobiles and light-duty trucks, and the 5-year class included all other tangible personal property that was not within the 3-year class. H. Conf. Rept. 97-215, at 206-208 (1981), *1981-2 C.B. 481, 487-488*. Thus, under *section 168* as added to the 1954 Code by ERTA, personal property that is "recovery property" must be either 3-year- or 5-year-class property. *Sec. 168(c)(2)* as added to the 1954 Code by ERTA ("Each item of recovery property shall be assigned to one of the following classes of property"). Although "3-year property" requires a taxpayer to determine whether the property had a class life under ADR of 4 years or less, the term "5-year property" is appropriately designed to include all other *section 1245* class property.

Inasmuch as *section 168(a)* allows a taxpayer to deduct depreciation with respect to "recovery property", petitioners may deduct depreciation on the Tourte bows if the bows fall within the meaning of that term. The term "recovery property" is defined broadly under ERTA to mean tangible property of a character subject to the allowance for depreciation and placed in service after 1980. Accordingly, property is "recovery property" if it is: (1) Tangible, (2) placed in service after 1980, (3) of a character subject to the allowance for depreciation, and (4) used in the trade or business, or held for the production of income. *Sec. 168(c)(1)*; *Noyce v. Commissioner, 97 T.C. 670, 689 (1991)*; see also ERTA sec. 209(a), 95 Stat. 172.

The Tourte bows fit snugly within the definition of recovery property. First, it is indisputable that the Tourte bows are tangible property, and that they were placed in service after 1980. Thus, the first two prerequisites for ACRS depreciation are met. Second, petitioners regularly used the Tourte bows in their trade or business as professional violinists during the year in issue. Accordingly, we conclude that petitioners [*260] have also met this prerequisite for depreciating the Tourte bows. [9]

9 In this regard, we note that petitioners are both well-educated, full-time professional musicians who take pride in playing their music to the best of their abilities. The Tourte bows help petitioners to accomplish this goal and are essential tools of their trade.

The last prerequisite for depreciating personal property under *section 168* is that the property must be "of a character subject to the allowance for depreciation". The term "of a character subject to the allowance for depreciation" is undefined in the 1954 Code. Comparing the language that the Congress used in *section 167(a)* of the 1954 Code immediately before its amendment by ERTA, *supra* p. 254, with the language that it used in *section 168(a)* and *(c)(1)* as added to the 1954 Code by ERTA, *supra* pp. 255-257, we believe that the Congress used the term "depreciation" in *section 168(c)(1)* to refer to the term "exhaustion, wear and tear (including a reasonable allowance for obsolescence)" that is contained in *section 167(a)*. See *Noyce v. Commissioner, supra at 689*. Accordingly, we conclude that the term "of a character subject to the allowance for depreciation" means that property must suffer exhaustion, wear and tear, or obsolescence in order to be depreciated. Accordingly, petitioners will meet the final requirement under *section 168* if the Tourte bows are subject to exhaustion, wear and tear, or obsolescence. [10]

10 The Tourte bows will also be "*section 1245* class property" if they are subject to exhaustion, wear and tear, or obsolescence. In this sense, the Tourte bows will constitute "property *of a character* subject to the allowance for depreciation provided in *section 167*" (emphasis supplied). See *supra* note 8. Accord *John R. Thompson Co. v. United States, 477 F.2d 164, 169 (7th Cir. 1973)* ("Except to the extent that they are subject to physical decay * * *, works of art are not depreciable"); *Associated Obstetricians & Gynecologists, P.C. v. Commissioner, T.C. Memo. 1983-380* ("respondent admits that * * * [her position

in *Rev. Rul. 68-232, 1968-1 C.B. 79*] would not prohibit depreciation deductions with respect to artworks if the physical condition of the property can be shown to limit or determine its useful life"), affd. *762 F.2d 38 (6th Cir. 1985)*.

We are convinced that petitioners' frequent use of the Tourte bows subjected them to substantial wear and tear during the year in issue. Petitioners actively played their violins using the Tourte bows, and this active use resulted in substantial wear and tear to the bows. [11] Indeed, respondent's [*261] expert witness even acknowledged at trial that the Tourte bows suffered wear and tear stemming from petitioners' business; the witness testified that the Tourte bows had eroded since he had examined them 3 years before, and that wood had come off them. Thus, we conclude that petitioners have satisfied the final prerequisite for depreciating personal property under *section 168*, and, accordingly, hold that petitioners may depreciate the Tourte bows during the year in issue. Allowing petitioners to depreciate the Tourte bows comports with the text of *section 168*, and enables them to match their costs for the Tourte bows with the income generated therefrom. Refusing to allow petitioners to deduct depreciation on the Tourte bows, on the other hand, would contradict *section 168* and vitiate the accounting principle that allows taxpayers to write off income-producing assets against the income produced by those assets.

11 In this regard, we do not believe that the Tourte bows are so-called works of art. We define a "work of art" as a passive object, such as a painting, sculpture, or carving, that is displayed for admiration of its aesthetic qualities. See Webster's New World Dictionary 1539 (3d coll. ed. 1988). The Tourte bows, by contrast, functioned actively, regularly, and routinely to produce income in petitioners' trade or business. Although a computer utilized by a child to play games is not a depreciable asset, the same computer becomes a depreciable asset if it is used actively, regularly, and routinely by a data processor in his or her trade or business. By the same token, the Tourte bows could have been collector's items except for the fact that petitioners used them actively, regularly, and routinely in their full-time business.

With respect to respondent's arguments in support of a contrary holding, we believe that respondent places too much reliance on the fact that the Tourte bows are old and have appreciated in value since petitioners acquired them. Indeed, respondent believes that this appreciation, in and of itself, serves to prevent petitioners from claiming any depreciation on the Tourte bows. We disagree; *section 168* does not support her proposition that a taxpayer may not depreciate a business asset due to its age, or due to the fact that the asset may have appreciated in value over time. *Noyce v. Commissioner, supra at 675, 691* (taxpayer allowed to deduct depreciation under *section 168* on an airplane that had appreciated in economic value). Respondent incorrectly mixes two well-established, independent concepts of tax accounting, namely, accounting for the physical depreciation of an asset and accounting for changes in the asset's value on account of price fluctuations in the market. [12] Accord *Fribourg Navigation Co. v. Commissioner,* [*262] *383 U.S. at 277*; *Macabe Co. v. Commissioner, 42 T.C. 1105, 1109 (1964)*. Moreover, we find merit in petitioners' claim that they should be able to depreciate an asset that receives substantial wear and tear through frequent use in their trade or business. Simply stated, the concept of depreciation is appropriately designed to allow taxpayers to recover the cost or other basis of a business asset through annual depreciation deductions. [13]

12 Accounting for depreciation of assets is an annual offset to gross income by deductions that represent the exhaustion, wear and tear, or obsolescence of an income-producing asset. Depreciation occurs on a daily basis, and depreciation accounting reflects the daily diminution in value of the underlying asset through other than market conditions.

Accounting for changes in the values of depreciable property because of market conditions, on the other hand, is reportable as gain or loss upon the sale of the depreciable asset. This concept accounts for the increase or decrease in the market value of an asset on account of fluctuations caused by inflation, scarcity, or the like; such fluctuations are independent of the decrease in value of an asset through depreciation. *Fribourg Navigation Co. v. Commissioner, 383 U.S. 272, 277 (1966)*; *Macabe Co. v. Commissioner, 42 T.C. 1105, 1109-1110 (1964)*.

13 We note that the Congress enacted *sec. 1245* in 1962 to minimize any perceived inequities that may have occurred due to the fact that a taxpayer's depreciation deductions offset his or her ordinary income, but the taxpayer's gain on the sale of the depreciable asset was reportable as capital gain. Under *sec. 1245*, taxpayers must report as ordinary income any gain on a sale of depreciable personal property to the extent of the prior depreciation that they have taken on the property. *Fribourg Navigation Co. v. Commissioner, supra at 285*.

We also reject respondent's contention that the Tourte bows are nondepreciable because they have value as collectibles independent of their use in playing musical instruments, and that this value prolongs the Tourte bows' useful life forever. First, it is firmly established that the term "useful life" under pre-ERTA law refers to the period of time in which a particular asset is *useful to the taxpayer* in his or her trade or business. *Fribourg Navigation Co. v. Commissioner, supra at 277*; *Massey Motors, Inc. v. United States, 364 U.S. 92 (1960)*; *sec. 1.167(a)-1(b), Income Tax Regs.* Thus, the fact that an asset such as the Tourte bows may outlive a taxpayer is not dispositive of the issue of whether that asset has a useful life for depreciation purposes under pre-ERTA law. Second, the same argument concerning a separate, nonbusiness value can be made of many other assets. Such types of assets could include, for example, automobiles, patented property, highly sophisticated machinery, and real property. For the Court to delve into the determination of whether a particular asset has a separate, nonbusiness value would make the concept of depreciation a subjective issue and would be contrary to the Congress' intent to simplify the concept and computation of depreciation.

With respect to respondent's contention that petitioners must prove a definite useful life of the Tourte bows, we acknowledge that the concept of useful life was critical under pre-ERTA law. Indeed, the concept of useful life was necessary and indispensable to the computation of depreciation because taxpayers were required to recover their investments in personal [*263] property over the estimated useful life of the property. *Sec. 1.167(a)-1(a), Income Tax Regs.* However, the Congress enacted ERTA, in part, to avoid constant disagreements over the useful lives of assets, to shorten the writeoff periods for assets, and to encourage investment by providing for accelerated cost recovery through the tax law. S. Rept. 97-144, at 47 (1981), *1981-2 C.B. 412, 425*. See generally 1981 Bluebook, at 75. To these ends, the Congress created two short periods of years over which taxpayers would depreciate tangible personal property used in trade or business; the 3-year and 5-year recovery periods, respectively, are the *deemed useful life* of personal property. After the taxpayer has written off his or her asset over this 3-year or 5-year period, the taxpayer's basis in that asset will be zero; thus, the taxpayer will need to purchase a new asset in order to receive a future tax deduction with respect thereto. Respondent's argument that a taxpayer must first prove the useful life of personal property before he or she may depreciate it over the 3-year or 5-year period would bring the Court back to pre-ERTA law and reintroduce the disagreements that the Congress intended to eliminate by its enactment of ERTA. This the Court will not do.

Respondent mainly relies on *Clinger v. Commissioner, T.C. Memo. 1990-459*, and *Browning v. Commissioner, T.C. Memo. 1988-293*, affd. *890 F.2d 1084 (9th Cir. 1989)*, to support a

holding contrary to the one that we reach today. [14] We find both of these cases distinguishable. First, in *Clinger*, the taxpayer was a professional portrait artist who painted in the style of her former teacher and well-known portrait artist, Alvin Gittins. Based on the taxpayer's belief that she could further her studies of Gittins, establish her credentials as a painter, and facilitate the marketing of her paintings, the taxpayer purchased a painting by Gittins and displayed it among her own paintings that she had hanging in her studio. [*264] The taxpayer claimed deductions under ACRS with respect to the purchased painting.

> 14 Respondent also relies on sec. 1.168-3(a), Proposed Income Tax Regs., *49 Fed. Reg. 5957* (Feb. 16, 1984), and *Rev. Rul. 68-232, 1968-1 C.B. 79*. We find this reliance misplaced; neither proposed regulations nor revenue rulings are entitled to judicial deference. See, e.g., *Tandy Corp. v. Commissioner, 92 T.C. 1165, 1170 (1989)*; *Natomas North America, Inc. v. Commissioner, 90 T.C. 710, 718 n.11 (1988)*; *North Ridge Country Club v. Commissioner, 89 T.C. 563, 579-580 (1987)*, revd. on other grounds *877 F.2d 750 (9th Cir. 1989)*. Moreover, we conclude that the Tourte bows are not "works of art" because, inter alia, the bows were used by petitioners in their trade or business as professional violinists. See *supra* note 11.

We sustained respondent's determination that the taxpayer was not entitled to deductions on the painting under ACRS. In so doing, we rejected the taxpayer's argument that the concept of useful life was eliminated with the enactment of ACRS, and accepted respondent's argument that a taxpayer must prove a determinable useful life. Our holding there, however, is distinguishable from the case at hand; unlike the Tourte bows, the painting in *Clinger* was not an asset that suffered substantial wear and tear through its regular, active, and physical use in the taxpayer's trade or business. To the extent, however, that respondent relies on a broad reading of *Clinger* to support her proposition that petitioners must prove *the* useful life of the Tourte bows in order to depreciate them, respondent misconstrues our holding in *Clinger*. In *Clinger*, the Court merely held that ACRS required that the taxpayer had to prove *a* determinable useful life of her passive business asset that suffered no discernible wear and tear. Determinable means "that can be determined". Webster's New World Dictionary 375 (3d coll. ed. 1988). Accordingly, once a taxpayer establishes that an asset is subject to exhaustion, wear and tear, or obsolescence, we can determine whether its useful life is 3-year- or 5-year-class property under ACRS. As coherently and succinctly stated by this Court in a Court-reviewed opinion:

> Availability of deductions for depreciation on tangible property in this case is dependent solely upon compliance with *section 168*, which has only two requirements for deduction of depreciation. First, the asset (tangible) must be of a type which is subject to wear and tear, decay, decline, or exhaustion. * * * Second, the property must be used in the taxpayer's trade or business or held for the production of income. * * * The language of the section is unequivocal. [*Noyce v. Commissioner, 97 T.C. at 689*.]

Browning v. Commissioner, T.C. Memo. 1988-293, affd. *890 F.2d 1084 (9th Cir. 1989)*, is also distinguishable. In *Browning*, the taxpayer was a musician who performed in nightclubs and bars and for private engagements. Prior to and during 1980 and 1981, the taxable years in issue there, the taxpayer purchased several expensive antique violins, including a Ruggeri, a Stradivarius, and a Gabrielli. The Ruggeri and the Stradivarius violins were purchased in 1978 [*265] and 1979, respectively, and were subject to the pre-ERTA rules for depreciation. The Gabrielli violin was purchased in 1981, and was subject to ACRS. During 1980 and 1981, the taxpayer claimed depreciation deductions with respect to the Ruggeri and Stradivarius violins;

the taxpayer amended his petition in this Court to claim that *section 168* of the 1954 Code, as added by ERTA, allowed him to deduct depreciation on the Gabrielli violin for his 1981 taxable year.

The Court in *Browning* sustained respondent's determination that the taxpayer was not entitled to any depreciation deductions on the violins. In so doing, the Court first stressed that the taxpayer had presented no credible evidence to support a contrary holding with respect to the Stradivarius violin. Indeed, neither the taxpayer nor his wife testified at trial; we also found unpersuasive the evidence that the taxpayer did present at trial, an expert's report and that expert's testimony. With respect to the other two violins (including the one subject to ACRS), we held for respondent because the taxpayer failed to present any evidence with respect to those violins.

The record in the instant case, by contrast to the record in *Browning*, is replete with evidence showing clearly that the Tourte bows suffered substantial wear and tear while petitioners used them in their trade or business. Accordingly, unlike the taxpayer in *Browning*, petitioners have met their burden of proving wear and tear to their business asset. To state the obvious, violin bows are subject to wear and tear when in use by a professional violinist. Indeed, as stated by Publilius Syrus circa 42 B.C.: "The bow too tensely strung is easily broken." Bartlett, Familiar Quotations 1103 (12th ed. 1951).

We have considered all other arguments made by respondent and find them to be without merit.

To reflect concessions by the parties,
Decision will be entered under Rule 155.