Liddle v. Commissioner

103 T.C. 285*; *1994 U.S. Tax Ct. LEXIS 61*; *103 T.C. No. 16

August 22, 1994, Filed

DISPOSITION: *Decision will be entered under Rule 155*.

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

OPINION BY: LARO

OPINION

[*286] Laro, *Judge:* This case was assigned to and heard by Special Trial Judge Carleton D. Powell pursuant to *section 7443A(b)(3) of the Internal Revenue Code*, and pursuant to *Rules 180, 181*, and *182, Tax Court Rules of Practice and Procedure*. The case is now assigned to Judge David Laro. The Court agrees with and adopts the findings of fact of the Special Trial Judge, who reached a contrary legal conclusion.

Brian P. and Brenda H. Liddle petitioned the Court for redetermination of respondent's determinations reflected in a notice of deficiency issued to them on November 20, 1991. The notice reflected respondent's determination of a $ 602 deficiency in petitioners' Federal income tax for 1987. Section references are to the Internal Revenue Code in effect for 1984, see *infra* note 3, and Rule references are to the Tax Court Rules of Practice and Procedure. The term "petitioner" in the singular is used to refer to Brian P. Liddle.

Following concessions by the parties, [1] the sole issue for decision is whether petitioners are entitled to the 1987 depreciation deduction that they claimed under the accelerated cost recovery system (ACRS), *sec. 168*, on a 17th-century Ruggeri bass viol (viol) that petitioner used in his trade or business as a full-time professional musician. As discussed below, we hold that petitioners are entitled to this depreciation deduction.

1 Petitioners conceded that a $ 26 increase in "other income" and $ 275 increase in interest income were proper. Respondent allowed $ 1,304 in additional miscellaneous deductions.

FINDINGS OF FACT

Some of the facts have been stipulated and are so found. The stipulation of facts and attached exhibits are incorporated herein by this reference. Petitioners resided in Philadelphia, Pennsylvania, when they filed their petition.

Petitioner has played the bass viol professionally for over a decade. He studied under Roger M. Scott, principal bassist [*287] of the Philadelphia Orchestra, while on a full scholarship at the Curtis Institute of Music. He has performed with various professional music organizations, including the Philadelphia Orchestra, the Baltimore Symphony, the Pennsylvania ProMusica, and the Performance Organization.

The viol was built by Francesco Ruggeri (c. 1620-1695), a luthier active in Cremona, Italy. He studied stringed instrument construction under Nicolo Amati, who also instructed Antonio Stradivari. His other contemporaries include the craftsmen Guadanini and Guarneri. These artisans are members of the so-called Cremonese School of instrument makers.

Petitioner purchased the viol for $ 28,000 on November 8, 1984; at that time, it was in an excellent state of restoration, and had no apparent cracks or other damage. He insured the viol for its then-appraised value of $ 38,000. Petitioner acquired the viol with the belief that it would serve him throughout his professional career, about 30 to 40 years. However, he exchanged it for a Domenico Busan 18th-century bass viol (Busan) on May 10, 1991, that was appraised at $ 65,000 on the date of the exchange. Petitioner thought that the "more vocal" tonal quality of the Busan would appeal to audition committees more than the "rich, deep" sound of the viol.

The market among nonmusicians for Cremonese School instruments flourishes. Many collectors primarily seek out the "label"; i.e., the maker's name on the instrument as verified by the certificate of authenticity. Being nonplayers, they do not overly concern themselves with the physical condition of the instrument; they have their eye only on the market value of the instrument as a collectible. As the quantity of these instruments has declined through loss or destruction over the years, the value of remaining instruments as collectibles has experienced a corresponding increase.

A stringed instrument, when used on a regular basis, must receive proper maintenance in order to preserve its tonal quality and retard the decay of the instrument. Among other things, the constant playing of a stringed instrument results in wear and tear, nicks and scratches to the exterior of the instrument, and wear to the varnish. In addition, stringed instruments lose mass due to the acidic qualities of perspiration from the performer's hands as well as through the natural [*288] oxidation of the wood. Furthermore, the climate affects the condition of a stringed instrument; the climate changes the structural integrity of: (1) The top of the instrument, and (2) the piece of wood fitted inside the body of the instrument that supports the bridge and governs the instrument's timbre. Some of the more significant indices of climatic wear are the opening of the instrument's seams and the opening (or reopening) of cracks. [2] While instruments of this nature are subject to the general wear and tear that instruments used by musicians experience, there is no evidence that such wear and tear exhausts the utility and value of the instruments over definite time periods. The prices of instruments similar to the viol that are properly maintained have increased over many years.

2 The seams of a stringed instrument open up by design to prevent cracking of the woodgrain. These openings may occur several times during a season, and severe damage will result if the opened seam goes unchecked.

During the time relevant herein, petitioner used the viol as his primary instrument in his full-time professional work as a musician; he used it for practice, auditions, rehearsals, and performances with symphony orchestras. Petitioner's use of the viol subjected it to wear and tear that did not reduce its economic value.

On petitioners' joint 1987 Federal income tax return, they claimed a depreciation deduction of $ 3,170 with respect to the viol, under *section 168*. [3] Respondent disallowed this deduction in full, stating in her notice of deficiency that the viol "in fact will appreciate in value and not depreciate".

3 Because the viol was placed in service in 1984, the Internal Revenue Code applicable to that year governs the computation of its depreciation for petitioners' 1987 taxable year. *Sec. 168*; see also the 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).

OPINION

The facts of this case are remarkably similar to the facts in the Court's recent opinion in *Simon v. Commissioner, 103 T.C. 247 (1994)*. In *Simon*, we held that the taxpayers were allowed to deduct depreciation under ACRS, *sec. 168*, on two 19th-century violin bows that they regularly used in their trade or business as full-time professional violinists. Due to the similarity between the instant case and *Simon*, our [*289] analysis and conclusion here today naturally flow from our opinion in *Simon v. Commissioner, supra.*

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 viol.

Depreciation deductions allow a taxpayer to recover his or her investment in an income-producing asset over its useful life. *United States v. Ludey, 274 U.S. 295 (1927)*; *Macabe Co. v. Commissioner, 42 T.C. 1105, 1109 (1964)*. To this end, taxpayers have long been allowed to recover their investments through allocations of depreciation deductions that represent their expenses of using an income-producing asset in the different periods that are benefited by that asset. *Massey Motors, Inc. v. United States, 364 U.S. 92, 104 (1960)*; *United States v. Ludey, supra at 300-301*. 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 therefrom; this meaningful match, in turn, bolsters the integrity of the taxpayer's periodic income statements. *Hertz Corp. v. United States, 364 U.S. 122, 126 (1960)*; *Massey Motors, Inc. v. United States, supra at 104*. In this sense, depreciation allocations represent a return to the taxpayer of his or her investment in the income-producing property over the years in which depreciation is allowed; such an allocation does not necessarily reflect a decline in the market value of the underlying asset. *Fribourg Navigation Co. v. Commissioner, 383 U.S. 272, 277 (1966)*; *Virginian Hotel Corp. v. Helvering, 319 U.S. 523, 528 (1943)*; *Detroit Edison Co. v. Commissioner, 319 U.S. 98, 101 (1943)*. In the same sense, an allocation of depreciation to a given year represents that year's reduction of the underlying asset through physical wear and tear. *United States v. Ludey, supra at 300-301*. This rationale for depreciation deductions is seen from the fact that the Congress designed ACRS to provide investment stimulus by allowing businesses to deduct costs of capital expenditures more quickly than was allowed previously. S. Rept. 97-144, at 47 (1981), *1981-2 C.B. 412, 425*. See generally Staff of Joint Comm. on Taxation, General Explanation of the Economic Recovery Tax [*290] Act of 1981, at 75 (J. Comm. Print 1981) (hereinafter referred to as the 1981 Bluebook).

Prior to the Economic Recovery Tax Act of 1981 (ERTA), Pub. L. 97-34, 95 Stat. 172, personal property was depreciated pursuant to *section 167 of the Internal Revenue Code of 1954* (the 1954 Code). The regulations under *section 167* expanded on its text by providing that personal property was depreciable before ERTA only 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, supra at 277*; *Massey Motors, Inc. v. United States, supra*; *sec. 1.167(a)-1(b), Income Tax Regs.* The primary method that was utilized to ascertain the useful life for personal property was the asset depreciation range (ADR) system. For a brief discussion of the ADR system, see *Simon v. Commissioner, supra at 254-255*; S. Rept. 97-144, at 39 (1981), *1981-2 C.B. at 421*.

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", "inherently uncertain", and "frequently [resulted] in unproductive disagreements between taxpayers and the Internal Revenue Service." S. Rept. 97-144, *supra at 47*, *1981-2 C.B. at 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 tax 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; the rules implementing ACRS were prescribed in *section 168*. ACRS is mandatory and applies to most tangible depreciable assets placed in service after 1980 and before 1987. ERTA sec. [*291] 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.

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 many relatively long periods of time included in the ADR system to the four short periods of time included 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) Income tax problems that resulted mainly from complex depreciation computations and useful life litigation, and (2) 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.

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 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 viol because it will appreciate in value. On brief, respondent also argues that the useful life of the viol is indeterminable because the viol is a "work of art" for which it is impossible to determine a useful life. In this regard, respondent contends that petitioners must prove a specific or reasonable estimate of [*292] the number of years that the viol will be useful to them in order to depreciate it under ACRS.

We disagree with respondent that petitioners may not depreciate the viol 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 over the useful life of assets that were used in taxpayers' trades or businesses. With this "elimination of disagreements" purpose in mind, the Congress designed ERTA to include five broad classes of "recovery property" and to include four short periods of years over which taxpayers could recover their costs of "recovery property". See *sec. 168(b)* and *(c)*, as added to the 1954 Code by ERTA. Two of these classes, the 3-year and 5-year classes, encompassed all tangible personal property (other than public utility 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. *Sec. 168(c)(2)*, as added to the 1954 Code by ERTA; see also 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 (other than public utility 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 of 4 years or less under the ADR system, the term "5-year property" is appropriately designed to include all other *section 1245* class property (other than public utility property). *Id.* For this purpose, the term "*section 1245* class property" was defined liberally to include 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 (emphasis added).

Inasmuch as *section 168(a)* allows a deduction with respect to "recovery property", petitioner may claim such a deduction on the viol if it falls within the meaning of that term. The term "recovery property" is defined broadly to mean: (1) Tangible property, (2) of a character subject to the allowance for [*293] depreciation, (3) used in a trade or business or held for the production of income, and (4) placed in service after 1980. *Sec. 168(c)(1)*; see also ERTA sec. 209(a), 95 Stat. 172. Accordingly, as we held in *Simon v. Commissioner, 103 T.C. 247 (1994)*, a plain reading of the applicable statutory language leads to the conclusion that property is "recovery property" if it is: (1) Tangible, (2) placed in service after 1980, (3) used in a trade or business, or held for the production of income, and (4) of a character subject to the allowance for depreciation. [4] See also *sec. 168(c)(1)*; ERTA sec. 209(a), 95 Stat. 172; *Noyce v. Commissioner, 97 T.C. 670, 689 (1991)*.

4 It is a cardinal principle of statutory construction that the interpretation of a statute starts with the text therein. *Landgraf v. USI Film Prods., 511 U.S. , 114 S. Ct. 1483 (1994)*; *Consumer Prod. Safety Commn. v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)*. Statutory language is interpreted by giving each word its plain, obvious, and rational meaning. *American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982)*; *United States v. Merriam, 263 U.S. 179, 187-188 (1923)*. Where the text of a statute is clear, statutory construction ends there; the statute must be enforced as written. *United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989)*.

The viol fits snugly within the definition of recovery property. First, it is indisputable that the viol is tangible property, and that it was placed in service after 1980. Thus, the first two requirements for ACRS depreciation are met. Second, petitioner regularly used the viol in his trade or business as a professional musician. Accordingly, petitioners have also met the third requirement.

The last requirement for deducting depreciation on personal property under *section 168* is that the property must be "of a character subject to the allowance for depreciation". The quoted term 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 [5] with the language that it used in *section 168(a)* and *(c)(1)* as added to the 1954 Code by ERTA, [6] we believe that the Congress [*294] 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)* of the 1954 Code immediately before its amendment by ERTA. *Simon v. Commissioner, supra at 260*; *Noyce v. Commissioner, supra at 689*. Accordingly, petitioners will meet the final requirement under *section 168* if the viol is subject to exhaustion, wear and tear, or obsolescence. [7]

5 *Sec. 167(a)* of the 1954 Code, immediately before its amendment by ERTA, 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.

6 *Sec. 168(a)* and *(c)*, as added to the 1954 Code by ERTA, provided:

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.

* * *

(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.

7 The viol will also be "*section 1245* class property" if it is subject to exhaustion, wear and tear, or obsolescence. In this regard, the viol constitutes "property *of a character* subject to the allowance for depreciation provided in *section 167*". *Sec. 1245(a)(3)* of the 1954 Code as amended by ERTA (emphasis added); see *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).*

Petitioner, through his testimony and through the testimony of his expert witness, has convinced us that the viol suffered wear and tear during the year in issue. See also *Massey Motors, Inc. v. United States, 364 U.S. 92, 96 (1960)* ("assets [other than ordinary stock in trade], employed from day to day in business, generally decrease in utility and value as they are used"). We disagree with respondent that the viol is a "work of art". A "work of art" is 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 viol, by contrast, functioned actively, regularly, and routinely to produce income in petitioner's trade or business. Although a computer utilized by a child to play games is not depreciable, the same computer is depreciable if it is used actively, regularly, and routinely by a data processor in his or her trade or business. By the same token, the viol could have been a nondepreciable work of art except for the fact that petitioner used it actively, regularly, and routinely in his full-time business.

Accordingly, having satisfied the four-prong *Simon* test, petitioners are entitled to their claimed depreciation deduction on the viol for the year in issue. Allowing petitioners to depreciate the viol comports with the text of *section 168*, and enables them to match their costs for the viol with the income generated therefrom. Refusing to allow petitioners to [*295] deduct depreciation on the viol, 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.

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 viol has appreciated in value since petitioner acquired it. Indeed, respondent believes that this appreciation, in and of itself, serves to prevent petitioners from claiming any depreciation on the viol. We disagree; *section 168* does not support respondent's proposition that a taxpayer may not depreciate a business asset due to the fact that the asset may appreciate in value over time. *Simon v. Commissioner, 103 T.C. at 261* (taxpayer allowed to deduct depreciation under *section 168* on two 19th-century violin bows that appreciated in value); *Noyce v. Commissioner, 97 T.C. at 675* (taxpayer allowed to deduct depreciation under *section 168* on an airplane that appreciated in economic value by 27 percent from the date of purchase until the time of trial). In arguing that an asset that appreciates because of its scarcity is never depreciable, respondent misapplies the well-established, separate concepts of tax accounting which are used to account for the physical depreciation of an asset, on the one hand, and a change in the asset's value due to price fluctuations in the market, on the other hand. [8] See *Fribourg Navigation Co. v. Commissioner, 383 U.S. 272, 277 (1966)*; *Macabe Co. v. Commissioner, 42 T.C. 1105, 1109 (1964)*. Respondent also has intertwined the mutually exclusive provisions that are firmly ingrained in the Internal Revenue Code to report physical depreciation vis-a-vis market value appreciation. [9] As recognized by the opinion of then [*296] Chief Justice Warren, "tax law has long recognized the accounting concept that depreciation is a process of estimated allocation which does not take account of fluctuations in valuation through market appreciation." *Fribourg Navigation Co. v. Commissioner, supra at 277*.

8 Accounting for physical depreciation is an annual offset to gross income by way of deductions that represent the exhaustion, wear and tear, or obsolescence of an income-producing asset. This concept appropriately recognizes the fact that wear and tear to an income-producing asset occur on a daily basis through its use and through the passage of time. By contrast, accounting for market-related changes in the values of depreciable property is not reflected daily; these changes are reportable as gain or loss upon the sale of the depreciable asset. See generally subch. P of ch. 1 of the Internal Revenue Code. Unlike the concept of physical depreciation, this latter concept accounts exclusively for the

increase or decrease in the market value of an asset on account of price fluctuations caused by inflation, scarcity, or the like; these types of fluctuations are independent of the decrease in the value of an asset through physical depreciation. *Fribourg Navigation Co. v. Commissioner, 383 U.S. 272, 277 (1966)*; *Macabe Co. v. Commissioner, 42 T.C. 1105, 1109-1110 (1964)*.

9 We note, for example, 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*.

With respect to respondent's contention that petitioners must prove a definite useful life of the viol, we acknowledge that the determination of useful life was critical under pre-ERTA law. Indeed, the determination of useful life was necessary and indispensable to the computation of depreciation because taxpayers were required to recover their investments in personal property, less salvage value, over the estimated useful life of the property. *Sec. 1.167(a)-1(a), Income Tax Regs.* The Congress enacted ERTA, however, to: (1) Avoid constant disagreements over the appropriate useful lives of assets, (2) shorten the writeoff periods for assets, and (3) 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*. To reach these ends, the Congress eliminated the concept of salvage value and created two short periods over which taxpayers would depreciate tangible personal property (other than public utility property) that was used in a trade or business; the 3-year and 5-year recovery periods, respectively, are the *deemed useful life* of personal property (other than public utility property). See *sec. 168(c)(2)*, as added to the 1954 Code by ERTA. Respondent's contention 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 this Court back to pre-ERTA law with respect to *all* personal property and would resurrect the disagreements that the Congress intended to eliminate by its enactment of ERTA. To this, we cannot agree. As we have said:

Availability of deductions for depreciation on tangible property * * * [under ACRS] 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, [*297] 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, supra at 689*.]

We have considered all other arguments made by respondent; the Court also considered similar arguments by the Commissioner in *Simon v. Commissioner, supra.* We found all of these arguments to be without merit in *Simon v. Commissioner, supra at 265*, and we find likewise today.

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