Montana Law Review

Volume 22
Issue 1 *Fall 1960*

Article 2

July 1960

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Recommended Citation

James W. Thompson, *Useful Life and Salvage Value Are Defined by the Supreme Court for Federal Income Tax Depreciation Purposes*, 22 Mont. L. Rev. 94 (1960).
Available at: https://scholarworks.umt.edu/mlr/vol22/iss1/2

mandamus would not have left relators without remedy, and that consequently, although the court may have reached a desirable result, an unnecessary ambiquity has been injected into the scope of the remedy available by mandamus.

Justice Adair is undoubtedly right about the blurring of distinctions between the extraordinary writs, but this may not be all evil. While it makes the law uncertain, it may also hasten the day when special relief will be available if the facts warrant it, whatever the label used. This is a stage long since reached in ordinary pleading, where misnomer of a cause of action will not preclude relief. Rejection of extraordinary relief because the wrong writ was sought is all the more unfortunate when it results from simple failure to use the device of applying for a writ in the alternative, since upon application for "a writ of mandamus or other appropriate relief" the court can and will lend its aid by whatever form of writ is technically proper.[12]

JOHN N. RADONICH

USEFUL LIFE AND SALVAGE VALUE ARE DEFINED BY THE SUPREME COURT FOR FEDERAL INCOME TAX DEPRECIATION PURPOSES.—In three companion cases the United States Supreme Court has passed upon significant questions concerning depreciation of property used in trade or business or for the production of income. All three cases involve automobiles or trucks which were ordinarily used for short periods, then resold substantially before the end of their full economic or physical lives. The figures used in describing the cases are hypothetical but typical.

In two of the cases the taxpayer took as basis for depreciation the cost of the vehicles to him ($1,650) less their value as scrap ($50) at the end of their economic life (4 years). As a result, at the time he sold them (after 2 years) they were depreciated (to $800) far below their actual resale price ($1,400) and the gain which he realized on the sale ($600) was

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arguable that the scope of the constitutional writ of injunction should be determined with reference to those available at common law at the time the Montana constitution was adopted. *Cf.*, Scharnikow v. Hogan, 24 Mont. 379, 62 Pac. 493 (1900). For discussion of cases involving mandatory injunctions see Klein, *Mandatory Injunctions*, 12 HARV. L. REV. 95 (1898).

The Montana Supreme Court, in Grosfield v. Johnson, 98 Mont. 412, 423, 39 P.2d 660, 664 (1935) stated: "With rare exception, the mandatory form will not be decreed for other purpose than to restore and maintain a condition which has been wrongfully changed, but the early restrictions on this form of injunction have given way to a more liberal construction of the court's power and the courts may relax the rules in order to attain the ends of justice."

[12]See State *ex rel.* Stewart v. District Court, 103 Mont. 487, 63 P.2d 141 (1936); State *ex rel.* Peel v. District Court, 50 Mont. 505, 197 Pac. 741 (1921). A qualification to this statement must be made, however, in circumstances like those in State *ex rel.* United States Fidelity & Guaranty Co. v. District Court, 77 Mont. 214, 250 Pac. 609 (1926), where upon an application for a writ of supervisory control or other appropriate remedy the court denied relief because while certiorari would have been appropriate the record from the court below had not been certified to the supreme court.

treated as a long-term capital gain instead of as ordinary income.[1] The Commissioner contended that the basis for depreciation should be the cost of the vehicles less the estimated resale price and that the depreciation period should be the period reasonably expected to elapse between acquisition and resale. In this way, if the time of resale and the price to be obtained were accurately estimated there would be no gain; the taxpayer would therefore be prevented from turning ordinary income into capital gain by way of deductions for depreciation. In one case the Court of Appeals for the Ninth Circuit held for the taxpayer,[2] and in the other the Court of Appeals for the Fifth Circuit held for the Commissioner.[3] On certiorari to the United States Supreme Court, *held,* the former judgment reversed and the latter affirmed. Depreciation of property used in trade or business is to be based upon the period during which the taxpayer may reasonably be expected to use it, and salvage value is the estimated amount of the resale price. *Massey Motors, Inc. v. United States,* 80 Sup. Ct. 1411 (1960) (Justices Harlan, Whittaker, Stewart, and Douglas dissenting).[4]

In the third case the taxpayer used the declining balance method of computing depreciation with respect to automobiles which had an economic life of four years but which he customarily retained in his business only two years. The declining balance method is available only if the property to be depreciated has a useful life of three years or more.[5] As to trucks, which the taxpayer used for more than three years, he was entitled to utilize the declining balance method, but in doing so he depreciated the trucks below their reasonable salvage value. Subsequent to the years involved, treasury regulations were promulgated defining useful life as the period over which the assets would be useful to the taxpayer and forbidding depreciation below salvage value.[6] The taxpayer urged that the regulations were inconsistent with the statute and that in any event they should not be retroactively applied to him. The district court held for the taxpayer,[7] but the Court of Appeals for the Third Circuit reversed.[8] On certiorari to the United States Supreme Court, *held,* affirmed. Useful life means the period during which the asset may reasonably be expected to be useful to the taxpayer in his trade or business; the declining balance method may not be used to depreciate property below its salvage or resale value; regulations to the foregoing effect are valid and may be applied retroactively to this taxpayer. *Hertz Corp. v. United States,* 80 Sup. Ct. 1420 (1960) (Justice Douglas dissenting[9]).

These three cases required the Supreme Court to pass upon the definition of "useful life" as applied to depreciable assets used in trade or business. The determination of the period of useful life was important for two reasons. Whether straight-line, declining balance or some other method

[1]Ordinary income is taxed at rates up to 91%, while a long-term capital gain is taxed at rates not exceeding 25%. INT. REV. CODE OF 1954, §§ 1, 1201.
[2]Evans v. Commissioner of Internal Revenue, 264 F.2d 502 (9th Cir. 1959).
[3]United States v. Massey Motors, Inc., 264 F.2d 552 (5th Cir. 1959).
[4]80 Sup. Ct. 1424 (1960).
[5]INT. REV. CODE OF 1954, § 167(c).
[6]Treas. Reg. § 1.167(a)-1(b) (1956).
[7]Hertz Corp. v. United States, 165 F. Supp. 261 (D. Del. 1958).
[8]268 F.2d 604 (3d Cir. 1959).
[9]80 Sup. Ct. 1424, at 1431 (1960).

is used for computing depreciation, the number of years of "useful life" is an important factor in computing the depreciation to be taken in each year.[10] Moreover, the declining balance option is available only if the asset has a useful life of at least three years.[11]

The phrase "useful life" was first used in the statute in 1954 in specifying when the declining balance method is available, but even then it was not defined.[12] The statutes since 1913 have referred to depreciation as being permitted for the "wear and tear of property arising out of its use or employment in the business"[13] or "wear and tear of property used in the trade or business."[14] The Commissioner's regulations have, however, since 1919 referred to the "useful life" of the property as determinative of the depreciation rate,[15] although the language of the regulations does not expressly limit "useful life" to the period during which such assets are held by the taxpayer. While the regulations and statutes do not use the term "useful life" with precision, the Supreme Court thought it reasonably clear that the language of the statutes and the regulations tended to support the view that useful life was the period over which the asset would be used by the taxpayer, and not the period of the asset's longer physical life.

It is, perhaps, difficult to approach the question by inquiring into the intent of Congress because the statutes are somewhat ambiguous. The taxpayer in the *Massey* case contended that, regardless of the taxpayer's policy on replacements, useful life is the period of the asset's entire economic or physical life. For the most part, assets are retained for their entire economic life, but this is not true in the auto rental business. Taxpayer argues

[10]The traditional method of calculating the annual depreciation, whether for tax purposes or for accounting purposes, is the "straight-line" method. The annual depreciation can be expressed by the formula: $\frac{\text{Original cost—Salvage Value (if any)}}{\text{Estimated Years of Useful Life}}$

Declining balance depreciation is computed by using a rate of depreciation not exceeding twice the straight-line rate (computed without adjustment for salvage). This rate is applied uniformly to the undepreciated cost of the property.

For example, assume a machine costs \$1,000 and is expected to last the taxpayer 5 years after which time it can probably be resold for \$50. The straightline method, using the formula above would give depreciation of \$190 (*i.e.*, $\frac{\$1{,}000 - \$50}{5}$) each year for five years.

To compute depreciation using the declining balance method, first compute the straight-line *rate*. Since the machine will be used for 5 years, 1/5 or 20% is the annual rate. The taxpayer using the declining balance method can take up to twice this rate, or 40%, of the unrecovered cost each year, ignoring salvage value. The following table illustrates the depreciation to be taken for each of the 5 years:

Year	Unrecovered Cost at beginning of year	Depreciation rate applied to undepreciated cost	Amount of depreciation
1	$1,000.00	40%	$400.00
2	600.00	40%	240.00
3	360.00	40%	144.00
4	216.00	40%	86.40
5	129.60	40%	51.84
6	77.76	No depreciation is taken after the fifth year.	

For further illustrations, see Treas. Reg. § 1.167(b)-2(b).

[11]INT. REV. CODE OF 1954, § 167(c).

[12]*Ibid.*

[13]Act of Oct. 3, 1913, ch. 16, § 2, 38 Stat. 167.

[14]Revenue Act of 1918, § 214(a) (8), 40 Stat. 1067.

[15]Treas. Reg. 45, Art. 161 (1919), and Treas. Reg. 103, § 19-23(1)-1 (1940).

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that Congress set up a rule for the ordinary case and intended depreciation be based on the period during which the asset is economically valuable to the general business world. The main advantage to the taxpayer is that salvage is then the scrap value of the property at the end of its economic life, a problem to be taken up shortly. For the taxpayer in the *Hertz* case, however, useful life was important for still another reason: only if useful life were physical life and thus more than the three years required for the declining balance method could the taxpayer take advantage of that method of calculating depreciation.

Over the years, the Commissioner has taken the position in many Tax Court cases that useful life was physical life.[16] While his position cannot be said to be uniform in all cases, he certainly has not in the past adhered to his present position of holding-period life. In most of those cases, however, he was fighting premature depreciation and was not faced with the problem of other tax avoidance on the part of the taxpayer.[17] In view of the purpose of depreciation (*i.e.*, to allow the taxpayer to recover, tax-free, the cost of his depreciable assets), the Commissioner's present position seems to be the preferable one. Only if useful life is based upon the period during which the taxpayer reasonably expects to use the asset, will depreciation bear a logical relation to the cost of the taxpayer's using depreciable assets in his business or in the production of income. The Supreme Court unanimously agreed that, in principle, this present position is preferable to the contrary rule applied by some lower federal courts. The split in the Court was on another question.

Once useful life is defined, salvage value obviously refers to the amount expected to be recovered from the disposition of the asset at the end of its useful life. If, as in the instant cases, the taxpayer expects to dispose of his assets substantially before they are physically exhausted, then salvage value is the expected resale price at the time of disposal. Clearly the taxpayers in the instant cases would benefit most from the view that salvage value always means scrap value, for in such case, accumulated depreciation can include almost the entire cost of the asset. Then, on resale, the difference between the resale price and the undepreciated cost will be taxed at the favorable long-term capital gains rates rather than at ordinary income rates. In the *Hertz* case, however, there was a separate question whether Congress intended to make salvage value a limit on depreciation taken under the declining balance method. The taxpayer contended that Congress had

[16]Cited by the Court, 80 Sup. Ct. at 1417 n. 5, and some of them discussed in the dissenting opinion, 80 Sup. Ct. at 1428-29.

[17]By "other tax avoidance" is meant savings by way of long-term capital gains. It is doubtful that the Commissioner, in the Tax Court cases referred to in note 16, *supra*, would have taken a position that useful life was physical life if he were presented with issues similar to those in the instant cases, *i.e.*, if he knew the necessary result of his position would be to allow other taxpayers to set themselves up for tax savings by way of long-term capital gains, his position might have been very much different. That he did not realize the consequences is understandable since the car rental business is new and the insistence of customers on new cars only is even more recent. Thus, it has been only in recent years that car rental companies have been in the position of buying new cars at dealer prices and reselling them after short periods on the wholesale or retail market at prices near acquisition cost. Few businesses fall into this category, and therefore the Commissioner has not been faced with the situation often.

provided for a "built-in salvage value" for assets depreciated by the declining balance method, since under that method, salvage value is ignored in setting up the depreciation equation, and by applying a constant depreciation rate to the declining basis there will always be a mathematical residue of undepreciated cost.[18] This residue, contended Hertz, was intended by Congress to replace any other salvage value. A mathematical residue will not, however, have any logical relation to salvage value, regardless of the meaning given to the term, and according to the House Committee report, the declining balance method was intended to affect only "the timing and not the ultimate amount of depreciation."[19] Only if salvage value is the estimated recovery upon disposition will the ultimate amount of depreciation remain the same as under other methods of depreciation. On this point, the Supreme Court was in unanimous agreement that salvage value under any method of depreciation should, on principle, be no less than the expected recovery on disposition of the asset.

These rules on useful life and salvage value will have considerable tax consequences to car rental companies and to others enjoying a similar situation regarding acquisitions and disposals of fixed assets. Car rental companies buy new cars at dealer prices and resell them at wholesale or retail prices. If, as would often be the case, estimated resale price is only slightly less than original cost,[20] the taxpayer would be allowed a deduction for depreciation limited to the difference between original cost and estimated resale price. Then, on resale, if the resale price had been estimated accurately, there would be no gain or loss on disposition.[21] This situation, argued the taxpayers in the instant cases, rendered section 1231 of the 1954 Code[22] ineffective, for this section expressly provides for the recognition of long-term capital gains from the sales of depreciable property. It does not follow, however, that the Commissioner's present position and the rules announced in the instant cases will necessarily have the result of abolishing capital gains and the long-term capital gains advantage. Even under the Commissioner's present position, if an asset is sold before originally intended or for more money than originally estimated, a gain on resale would enjoy the favorable long-term capital gains treatment provided for in section 1231, if it otherwise qualifies.[23] The present rules merely require an originally honest and fair estimate of what useful life and salvage will be, based on the use the taxpayer himself expects to make of the asset. Any change of plans or change in the used asset values would not require the taxpayer to recompute depreciation for prior years, but would make available to him the provisions of section 1231.

[18]See note 10 *supra*.
[19]H.R. REP. No. 1337, 83d Cong., 2nd Sess. 25 (1954).
[20]In the *Massey* case used automobiles were actually sold after 40,000 miles for more than their cost to the taxpayer new.
[21]Of course, fluctuating resale prices can never be estimated two or three years in advance with any degree of accuracy, but gains and losses will, at least, be minimized by the application of the rules of the instant cases regarding useful life and salvage value.
[22]Section 1231 of the 1954 Code is substantially the same as § 117(j)(2) of the INT. REV. CODE OF 1939 under which the *Massey* case was decided.
[23]For a capital gain to be a long-term capital gain, the asset must have been held for more than 6 months. INT. REV. CODE OF 1954, § 1222.

The Supreme Court's split of opinion occurred regarding retroactive application of the rules to these taxpayers. In the *Massey* case, four justices dissented on the ground that the Commissioner has now taken a position contrary to his former position and that taxpayers were entitled to rely on the former position until changed. In the *Hertz* case, however, only Mr. Justice Douglas dissented. The other three justices agreed that the *Hertz* case, arising under the declining balance provision of the 1954 Code, presented a different problem from that in the *Massey* case. In the 1954 Code, Congress used the term "useful life" for the first time when provision was made for declining balance depreciation, and expressly gave the Commissioner authority to issue regulations prescribing the use of declining balance depreciation. Although regulations promulgated in 1956 might appear to be retroactive as to taxable years 1954, 1955, and 1956, these regulations were in fact the first ones issued under this provision of the 1954 Code, and any prior position regarding declining balance was expressed only in administrative practice and not by regulation. For this reason, the three justices agreed that the Commissioner should be allowed, by formal regulation, to change his position retroactive to the effective date of the statute under which it is promulgated. Justice Douglas urged that the regulation produced a change in administrative practice which should not be retroactively applied under the circumstances of the *Hertz* case.

Irrespective of the question of fairness in the retroactive application of the new rules to particular taxpayers, and of the question of the Commissioner's consistency through the years, these cases settle the law in the Commissioner's favor by holding that his regulations fairly carry out the intent and purpose of the provisions for depreciation. The present situation appears to be more in accord with generally accepted accounting principles, although, as the court noted, accounting authorities are not in complete harmony. The present position is proper, at least from the basis of fairness, since a taxpayer should not be allowed to distort the provisions of the tax laws to his own peculiar advantage, where it is reasonably clear that Congress intended to prohibit such advantage.

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