

TAX ALERT

WHEN IS A BUILDING “PLACED IN SERVICE” FOR DEPRECIATION PURPOSES: IRS ACTION ON DECISION RAISES ADDITIONAL CONCERNS

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May 22, 2017



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The Internal Revenue Service (IRS) recently announced in Action on Decision (AOD) 2017-02 its nonacquiescence to the court's holding in *Stine, LLC v United States*, that buildings built to operate as retail stores are placed in service for depreciation purposes when substantially complete. This means in a condition of readiness and availability to house and secure racks, shelving, and merchandise. It appears that the IRS will continue to argue that a building is considered placed in service for depreciation purposes when it is "open for business."

AOD 2017-02 could have far reaching consequences, especially as we consider the PATH Act (Protecting Americans from Tax Hikes) of 2015 and the potential sunset of bonus depreciation in 2020. Taxpayers who seek to maximize the use of depreciation available under the PATH Act should note that the rate for bonus depreciation will decrease from 50% to 40% in 2018, then to 30% for 2019, finally expiring for 2020. The selection of the assets "placed in service date" in the next three years can have a significant financial impact.

The IRS's position was that allowing a business to place a building into service before the establishment was "open for business" violated the matching principle in accounting, under which expenses should be reported in the same period as the related revenues. The Court viewed Go Zone Depreciation – a form of bonus depreciation – as a governmental carrot used to spur investment and stimulate the economy, and rejected the IRS's position, as they held that bonus depreciation itself rejects the matching principal. Furthermore, the court held that "tax law cases, regulations, revenue rulings, and tax guides" refute the IRS position.

The court's ruling in favor of the taxpayer in *Stine, LLC v. United States* would suggest that buildings which are substantially complete but not yet open for business can be considered "placed in service" for purposes of both regular depreciation and bonus depreciation. The IRS has indicated they will reject this ruling and to continue to litigate against taxpayers who do not use the "open for business" standard.

Both the buildings and the businesses using the buildings in the *Stine* case were owned by Stine, a point that shouldn't be missed. As such, there is still some uncertainty over whether the IRS will apply this standard to building owners who lease space to tenants after their structures are substantially complete.

It stands to reason that, at a time when the IRS has seen a reduction in funding coupled with an increased desire to secure revenue through collections and enforcement, we should anticipate additional scrutiny for taxpayers utilizing bonus depreciation under the PATH Act. It will be even more important for taxpayers to consult with their tax advisors and maintain thorough documentation which supports their selection of the

date used to place assets "in service." This matter has not been completely settled, and final resolution may not occur on this difference of opinion without further litigation.

Please contact your Mazars USA LLP professional for additional information.

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