Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Associate Area Counsel (Kansas City)
(Small Business/Self-Employed)
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from: George F. Wright
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(Income Tax & Accounting)

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subject:

This Chief Counsel Advice (CCA) responds to your memorandum dated October 19, 2005, requesting advice concerning §§ 121 and 1250 of the Internal Revenue Code. Section 121 generally permits a taxpayer to exclude gain of up to $250,000 ($500,000 in the case of certain married taxpayers filing joint returns) on the sale of property if, during the 5-year period ending on the date of such sale or exchange, the property has been owned and used by the taxpayer for periods aggregating 2 years or more. Section 121(d)(6), however, generally requires gain attributable to post-May 6, 1997, depreciation to be included in income.

The residential property in question was rented to unrelated individuals for more than 12 years, from February 1985 until late August 1997. Depreciation deductions were claimed during the entire rental period. About 95 percent of the rental period had elapsed, and about 97 percent of the total depreciation was claimed, before the current version of § 121 went into effect on May 7, 1997. In your memorandum, you asked whether any of the gain attributable to pre-May 7, 1997, depreciation was includible in the taxpayers' gross income for the taxable year.

ISSUES:

1. Are Taxpayers entitled to suspend the 2-out-of-5-year test period of § 121(a) by the 10-year period provided by § 121(d)(9) to members of the uniformed services and Foreign Service of the United States, and thus to exclude under § 121(a) all or part of their gain on the sale of property they had rented to others for more than 12 years preceding its sale?

2. Is any portion of the gain attributable to depreciation deductions taken on the property prior to May 7, 1997, subject to depreciation recapture under § 1250(a), and hence to inclusion in Taxpayers' gross income in the 1997 taxable year?

CONCLUSIONS:

1. Taxpayers satisfy the requirements of § 121(d)(9) and accordingly are entitled under § 121(a) to exclude most of their gain on the sale of their property.

2. A portion of the gain attributable to depreciation deductions taken before May 7, , is subject to recapture under § 1250(a) and must be included as ordinary income in Taxpayers' gross income.

FACTS:

This case involves the purchase of a house ("the property") in , its use by Taxpayers as a principal residence until January , Taxpayers' subsequent rental of the property (and claiming of depreciation deductions) for more than 12 years, and the property's sale on August , . The case also involves significant changes of law, most of which went into effect a few months before the sale occurred and one of which, passed in , retroactively and favorably affected the treatment of the sale. The change permitted Taxpayers to file an amended return claiming an exclusion of the gain they had included on their joint federal income tax return. The crux of this case is the extent, if any, to which Taxpayers' now-permitted exclusion is affected by depreciation deductions taken on the property prior to May 7, .

In this portion of our memorandum, we advert briefly to certain provisions of both old and new law. Those provisions, and others pertinent to our analysis, are discussed in more detail below under Law and Analysis.

Taxpayers are husband and wife who filed joint federal income tax returns for all relevant years. Husband is a member of the uniformed services of the United States and has been on active duty in the from to the present.

On July , , Taxpayers purchased a house located in , for approximately $. Taxpayers lived in the property and used it as their principal residence until January . Husband was then transferred by military orders to

another official post of duty several hundred miles away. Taxpayers thereupon moved out of the house and, because of Husband's military orders, never again reoccupied it.

Beginning in February , Taxpayers rented the property to unrelated individuals for their use as living accommodations. Taxpayers reported the rental income from the property, along with related expenses (depreciation, interest, taxes, insurance, and repairs), on their Form 1040, Schedule E. Taxpayers continued to rent the residence and to report the rental income and expenses, including depreciation, on successive Schedules E until they sold the property on August , .

In February , former § 168(b)(2) provided that 18-year real property could be depreciated over an 18-year recovery period,[1] with the depreciation percentage generally determined in accordance with the use of the 175-percent declining balance method. Although depreciation under that method initially is accelerated, the method permits switching to a straight-line computation when the switch would maximize depreciation deductions for any taxable year. In Taxpayers' records, they describe the method as "PRE," which stands for the percentage described in depreciation tables prepared by the Internal Revenue Service. The records also indicate they claimed a 9 percent depreciation deduction for the taxable year, which is consistent with using the accelerated method and an 18-year recovery period.

On May 7, , the current version of § 121 went into effect. Current § 121(a), which applies to sales or exchanges after May 6, , provides that gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more. Current § 121(d)(6), which provides for recognition of gain resulting from post-May 6, , depreciation (as defined in § 1250(b)(3)), also went into effect on May 7, .

After owning the property for more than 16 years, Taxpayers sold it for $ in August . However, Taxpayers were not allowed to claim the § 121(a) exclusion at the time of sale, because they had not <u>used</u> the property as their principal residence for a period aggregating 2 years or more during the 5-year test period that ran between August and August . Accordingly, Taxpayers filed a Form 4797, <u>Sales of Business Property</u>, as part of their joint federal income tax return. Taxpayers reported a gain of $ from the sale. The Form 4797 also reflected that Taxpayers took approximately $ of depreciation from February until August . Of the $20,936, approximately $582, or 3 percent of the total depreciation claimed, represents depreciation taken from May 7, to August 25, . The remaining

[1] During the years former § 168 was in effect, statutory changes increased the recovery period for real property from 15 years to 18 years, and then to 19 years. For example, § 111(a) of the Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 631 (July 18, 1984), amended §168(b)(2) by striking out "15-year real property" each place it appeared in the text and heading thereof and inserting in lieu thereof "18-year real property".

amount (approximately $20,354, or 97 percent of total depreciation claimed) represents depreciation taken prior to May 7, .

In 2003, Congress enacted the Military Family Relief Act of 2003, H.R. 3365, Pub. L. 108-121, 117 Stat. 1335 (Military Act). Section 121(d)(9), added by Military Act § 101(a), permits members of the uniformed services or of the Foreign Service of the United States to suspend the running of the 5-year test period under § 121(a) for any period that the member or the member's spouse is serving on qualified official extended duty as a member of the uniformed services or of the Foreign Service of the United States. Military Act § 101(b)(2) provided a 1-year period, beginning on the date of the Act's enactment, for an otherwise time-barred taxpayer to file a claim for refund.[2] On , , Taxpayers filed a Form 1040X, Amended U.S. Individual Income Tax Return, seeking a refund of $, plus statutory interest, for the taxable year. The Internal Revenue Service (Examination) disallowed all but $ of that claim for refund in a letter dated . In a letter dated , , Taxpayers requested the to reconsider Exam's disallowance of the bulk of Taxpayers' refund claim.

Taxpayers maintain that: (1) they are entitled under Military Act § 101(a) and § 121(d)(9) to treat their 1997 sale as the sale of a principal residence; and (2) all the gain on that sale is excludible under § 121(a) except for the approximately $582 portion that is attributable to post-May 6, , depreciation. Stated differently, Taxpayers maintain that only the § 121(d)(6) gain is includible in income.

Following informal consultations with this office, your office submitted a formal request for advice, seeking guidance on the extent, if any, to which Taxpayers are entitled to a refund for the taxable year.

LAW AND ANALYSIS

A. Former- and current-law provisions concerning dispositions of principal residences

Under former § 1034, no gain was recognized on the sale of a principal residence if a new residence at least equal in cost to the sales price of the old residence was purchased and used by the taxpayer as his or her principal residence within a period beginning 2 years before the date of such sale and ending 2 years after such date. The basis of the replacement residence was reduced by the amount of any gain not recognized on the sale of the old residence by reason of this gain rollover rule.

Under former § 121, a taxpayer, on a one-time basis, could exclude from gross income up to $125,000 of gain from the sale or exchange of a principal residence if the taxpayer

[2] President Bush signed the Military Act into law on November 11, 2003.

(1) had attained the age of 55 before the date of such sale or exchange, and (2) had owned the property and used it as a principal residence for 3 or more of the 5 years preceding the sale or exchange.

Section 312 of the Taxpayer Relief Act of 1997, Pub. L. 105-34 (May 6, 1997) (the 1997 Act) introduced current § 121, thus replacing former § 121. Section 312(b) of the 1997 Act repealed § 1034. Section 312(d) of the 1997 Act provided that new § 121 generally was effective for sales or exchanges made after May 6, 1997.

Current § 121(a), which applies to sales or exchanges made after May 6, 1997, provides that gross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more.

Current § 121(d)(6) provides that § 121(a) shall not apply to so much of the gain from the sale of any property as does not exceed the portion of the depreciation adjustments (as defined in § 1250(b)(3)) attributable to periods after May 6, 1997, in respect of such property. The term "depreciation adjustments" is defined in § 1250(b)(3) to include depreciation adjustments made after December 31, 1963, to the basis of property on account of deductions allowed or allowable to the taxpayer for exhaustion, wear and tear, obsolescence, or amortization. Section 1250(b)(3) further provides that if the taxpayer can establish by adequate records or other sufficient evidence that the amount allowed as a deduction for any period was less than the amount allowable, the amount taken into account for such period shall be the amount allowed.

Section 121(d)(9), added by Military Act § 101(a), provides that at the election of an individual with respect to a property, the running of the 5-year period described in § 121(a) with respect to such property shall be suspended during any period that such individual or such individual's spouse is serving on qualified official extended duty as a member of the uniformed services or of the Foreign Service of the United States. Under § 121(d)(9)(B), the 5-year period described in §121(a) shall not be extended more than 10 years by reason of § 121(d)(9)(A).

Section 121(d)(9)(C)(i) defines "qualified official extended duty" as any extended duty while serving at a duty station which is at least 50 miles from the property sold or exchanged or while residing under Government orders in Government quarters.

B. Former- and current-law provisions concerning depreciation deductions and depreciation recapture.

Former Code § 168, or the accelerated cost recovery system (ACRS), applies to recovery property placed in service after 1980 and before 1987. Former § 168(c)(1) provides that the term "recovery property" means tangible property of a character subject to a depreciation allowance used in a trade or business or held for the

production of income. Former § 168(c)(2)(D) provided that 18-year real property meant § 1250 class property that did not have a present class life of 12.5 years or less.

Former § 1245(a)(1), which generally applies to property placed in service after 1980 and before 1987, provides, in part, that if §1245 recovery property is sold after December 31, 1980, the amount by which the amount realized exceeds the adjusted basis of such property shall be treated as ordinary income. Such gain is recognized notwithstanding any other provision of subtitle A of the Code.

Former § 1245(a)(5), which also generally applied to property placed in service after 1980 and before 1987, provided that the term § 1245 recovery property includes recovery property (within the meaning of section168) other than 18-year real property that is residential rental property (as defined in § 167(j)(2)(B)).

Former § 167(j)(2)(B) provided that a building or structure is residential rental property for any taxable year only if 80 percent or more of the gross rental income from such building or structure for such year is rental income from dwelling units (within the meaning of § 167(k)(3)(C)).

Former § 167(k)(3)(C) provided that the term "dwelling unit" means a house or an apartment used to provide living accommodations in a building or structure, but does not include a unit in a hotel, motel, inn, or other establishment more than one-half of the units in which are used on a transient basis. For purposes of § 167(j)(2)(B), if any portion of a building or structure is occupied by the taxpayer, the gross rental income from the building or structure includes the rental value of the portion so occupied.

Section 1250(a) provides that if section 1250 property is disposed of after December 31, 1975, then the applicable percentage of the lower of that portion of the additional depreciation (generally, the excess of the depreciation taken over depreciation determined under the straight line method) attributable to periods after December 31, 1975, in respect of the property, or the excess of the amount realized over the adjusted basis is treated as gain that is ordinary income. Such gain is recognized notwithstanding any other provision of subtitle A of the Code.

Section 1250(c) provides that the term “section 1250 property” means any real property (other than section 1245 property, as defined in section 1245(a)(3) which is or has been property of a character subject to the allowance for depreciation provided in § 167. Former § 1250(d)(11) provided that section 1250(a) shall not apply to the disposition of property which is section 1245 recovery property (as defined in § 1245(a)(5)).

Generally, under section 1250(a)(1), either the lower of (1) the additional depreciation, that is, the excess of the accelerated depreciation deductions taken for the property over the amount of straight-line depreciation deductions that could have been taken for the property, or (2) the excess of the amount realized in the sale of the property over the adjusted basis of the property must be treated as ordinary income.

Prior to passage of the 1997 Act, former § 1250(d)(7) provided an exception to § 1250(a). Under former § 1250(d)(7), § 1250(a) applied neither (1) to a disposition of property to the extent used by the taxpayer as his principal residence (within the meaning of [former] § 1034, relating to rollover of gain on sale of principal residence), nor (2) to a disposition of property in respect of which the taxpayer meets the age and ownership requirements of [former] § 121 (relating to one-time exclusion of gain from sale of principal residence by individual who has attained age 55) but only to the extent that the taxpayer meets the use requirements of such section in respect of such property. Former § 1250(d)(7) was repealed by section 312(d)(10)(A) of the 1997 Act.

Section 1.1250-3(g) of the Income Tax Regulations provided rules pertaining to former § 1250(d)(7). Section 1.1250-3(g)(6) provided that, if a taxpayer acquired a new residence in a transaction to which former § 1034 applied, generally the additional depreciation for the new residence included the additional depreciation of the property disposed of.

C. Taxpayers are entitled to the benefits of the § 121(d)(9) 10-year suspension period.

We concur in your view that Taxpayers are entitled to the benefit of the § 121(d)(9) suspension period. Husband is a member of the uniformed services of the United States and was on qualified official extended duty for the entire period between January 1985 (when he and his family vacated the property) and August , (when the property was sold). Moreover, Taxpayers' claim for refund was filed on , , well within the 1-year window provided for such claims by Military Act § 101(b)(2).

We also concur that Taxpayers satisfy the § 121(a) 2-out-of-5-year test period when that period is combined with the § 121(d)(9) 10-year suspension period. Without the suspension period, Taxpayers would fail the test period, because Taxpayers, although owning the property during the 5-year period between August , , and August , , did not use the property during any part of that period. However, the effect of the suspension period is to move the test period back by 10 years. Accordingly, because of § 121(d)(9), the 2-out-of-5-year test period runs between August , , and August , . We do not know the exact date when Taxpayers moved out of the property, but even if they left on January 1, , Taxpayers clearly owned and used the property as their principal residence for a period of more than 24 full months (September through December). Accordingly, Taxpayers meet the 2-out-of-5 year test period of § 121(a).

D. Taxpayers are required to recapture and include in gross income the excess of the accelerated over straight line depreciation claimed from February through May 6, .

Current § 121(d)(6) provides that § 121(a) shall not apply to so much of the gain from the sale of any property as does not exceed the portion of the depreciation adjustments

(as defined in § 1250(b)(3)) attributable to periods after May 6, 1997, in respect of such property. Stated differently, § 121(d)(6) requires the inclusion of depreciation-related gain in a taxpayer's gross income if the depreciation was taken after May 6, 1997. In this case, approximately $582 of the gain on Taxpayers' property resulted from depreciation taken between May 7, , and the property's sale on August , . Taxpayers properly concede that such inclusion is required and will affect the amount of the refund they are entitled to receive for the taxable year.

The more difficult question is whether pre-May 7, , depreciation must also be taken into gross income. That question is not expressly answered by § 121(d)(6), which although explicit about what occurs after May 6, , is silent about pre-May 7, , depreciation. Taxpayers maintain, however, that because § 121(a) generally excludes gain and § 121(d)(6) expressly requires inclusion only of post-May 6, , depreciation-related gain, the natural conclusion is that pre-May 7, , depreciation-related gain is excluded from gross income.

It seems anomalous to allow Taxpayers both to receive the benefit of 12-plus years of depreciation (between February and May 6,), and to permanently exclude the gain resulting from that depreciation from income. Nevertheless, we might concur with Taxpayers were § 121 the only provision applicable to this sale. In fact, however, we conclude that under § 1250(a) Taxpayers are required to recognize as ordinary income the gain attributable to additional depreciation for the property. As explained at the end of this CCA, the amount that must be recognized and included in Taxpayers' 1997 is not the approximately $20,354 of pre-May 7, , depreciation claimed, but rather a little more than a tenth of that amount, or about $2,300.

If applicable, §§ 1245(a)(1) and 1250(a)(1) both require the recognition of depreciation-related gain "notwithstanding any other provision of this subtitle."[3] Moreover, §§ 1245(a)(1) and 1250(a)(1) apply unless an exception to recapture is provided for within the section itself. It is because both sections can override otherwise excludable gain that they are colloquially known as strong-arm provisions. These sections also generally recharacterize depreciation-related gain as ordinary income.[4]

Sections 1245 and 1250 are designed to be mutually exclusive; the same property cannot be subject to both provisions. After picking carefully through the welter of statutory provisions found in Part B, above, we conclude that Taxpayers' property falls

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[3] The subtitle referred to is subtitle A of the Code, pertaining to income taxes. All former- and current-law provisions referred to in this CCA are found in subtitle A.

[4] The recharacterization aspect of §§ 1245 and 1250 reflects the fact that although depreciation deductions are taken against ordinary income, sales of depreciable property may result in capital gain treatment under §§ 1221 or 1231. Sections 1245 and 1250 correct this imbalance by requiring a specified portion of the gain on disposition of depreciable property be reclassified as ordinary income. An excellent discussion of §§ 1245 and 1250 can found in Bittker & Lokken, Federal Taxation of Income, Estates and Gifts, Vol. 2, ch. 51 (Warren, Gorham & Lamont, 3d ed., 2000).

under § 1250. We note that former § 168, as part of ACRS, applies to recovery property placed in service after and before . Former § 168(c)(1) provides that the term "recovery property" means tangible property of a character subject to a depreciation allowance used in a trade or business or held for the production of income. When Taxpayers began to rent their former residence, former § 168(c)(2)(D) provided that 18-year real property meant § 1250 class property that did not have a present class life of 12.5 years or less. Taxpayers placed the residence in service as recovery property for personal use in July 1981. Thus, former § 168 applies to the property.

Former § 1245(a)(5)(A), which generally applied to property placed in service after and before , provided that the term § 1245 recovery property includes recovery property (within the meaning of § 168) other than 18-year real property that is residential rental property (as defined in § 167(j)(2)(B)). Based on the information submitted, we conclude that Taxpayers' property was 18-year real property that met the § 167(j)(2)(B) and (k)(3)(C) definition of residential real property.[5] Accordingly, Taxpayers' property is not covered by § 1245(a)(5)(A), but rather, by § 1250. See § 1250(c), which provides that the term § 1250 property means any real property (other than § 1245 property, as defined in § 1245(a)(3)) which is or has been property of a character subject to the allowance for depreciation provided in § 167. The conclusion that Taxpayers' property is subject to § 1250 is reinforced by former § 1250(d)(11), which provided that § 1250(a) shall not apply to the disposition of property which is § 1245 recovery property (as defined in § 1245(a)(5)).

Section 1250(a) provides that if section 1250 property is disposed of after December 31, 1975, then the applicable percentage of the lower of that portion of the additional depreciation (generally, the excess of the depreciation taken over depreciation determined under the straight line method) attributable to periods after December 31, 1975, in respect of the property, or the excess of the amount realized over the adjusted basis is treated as gain that is ordinary income.

As noted earlier, § 1250(a) gain is recognized notwithstanding any other provision of subtitle A of the Code, unless § 1250 itself contains an exception to the strong-arm recognition rule. The one candidate for the exception is former § 1250(d)(7), which was repealed by § 312(d)(10)(A) of the 1997 Act.

The 1997 Act, it will be recalled, also repealed former § 1034 and substantially modified former § 121. Under former § 1034, no gain was recognized on the sale of a principal residence if a new residence at least equal in cost to the sales price of the old residence was purchased and used by the taxpayer as his or her principal residence within a period beginning 2 years before the date of such sale and ending 2 years after such

[5] The materials provided us indicate that Taxpayers' property was a dwelling unit used to provide living accommodations on a non-transient basis, that all the rental income from the property came from its use as a dwelling unit, and that Taxpayers did not occupy any portion of the property while it was being rented to others. Accordingly, we conclude that the property is residential rental property, as defined in former § 167(j)(2)(B) and (k)(3)(C).

date. The basis of the replacement residence was reduced by the amount of any gain not recognized on the sale of the old residence by reason of the gain rollover rule.

Under former § 121, a taxpayer, on a one-time basis, could exclude from gross income up to $125,000 of gain from the sale or exchange of a principal residence if the taxpayer (1) had attained the age of 55 before the date of such sale or exchange, and (2) had owned the property and used it as a principal residence for 3 or more of the 5 years preceding the sale or exchange.

Former § 1250(d)(7) provided that § 1250(a) applied neither (1) to a disposition of property to the extent used by the taxpayer as his principal residence (within the meaning of former §1034, nor (2) to a disposition of property in respect of which the taxpayer meets the age and ownership requirements of former § 121 (relating to one-time exclusion of gain from sale of principal residence by individual who has attained age 55) but only to the extent that the taxpayer meets the use requirements of such section in respect of such property. Regulations under former § 1250(d)(7) are found in § 1.1250-3(g).

We conclude that former § 1250(d)(7) and § 1.1250-3(g) do not apply to shield Taxpayers from recapturing their pre-May 7, 1997, depreciation. Indeed, it is not clear that former § 1250(d)(7) would apply to the present case, even if it were still in effect, given that Taxpayers made no actual use of the property during the 12-year period they rented it to others as living accommodations. See generally § 1.121-1(c). The § 1.1250-3(g) regulations – promulgated long before current § 121 (and particularly, current § 121(d)(9)) were enacted – appear to contemplate situations in which taxpayers made business use of their properties while actually residing therein. The present case presents a significantly different situation, with Taxpayers having moved out of the property for good more than 12 years before the sale.

However, we need not reach that question here, because §§ 1034, 121, and 1250(d)(7) do not apply to this sale. In general, current § 121 applies to sales or exchanges occurring after May 6, 1997. Although § 312(d) of the 1997 Act contained transitional rules applicable to some post-May 6, 1997, sales and exchanges, those transition rules are not applicable here.

We conclude that the excess of the depreciation taken by Taxpayers over the depreciation allowable under the straight line method for periods prior to May 7, 1997, is subject to recapture after the repeal of § 1250(d)(7). Prior to May 7, , depreciation recapture could often be avoided on a § 1034 rollover. See Rev. Rul 82-26, 1982-1 C.B. 114. However, § 1.1250-3(g)(6) provided that, if a taxpayer acquired a new residence in a transaction to which former § 1034 applied, generally the additional depreciation for the new residence included the additional depreciation of the property disposed of. Thus, even before the repeal of §§ 1034 and 1250(d)(7), the possibility existed that depreciation that had escaped recapture under a § 1034 rollover could be recaptured as ordinary income on a subsequent sale of the replacement property.

The concurrent repeal of §§ 1034 and 1250(d)(7) did not cause depreciation recapture under § 1250(a) to disappear. After repeal of § 1034, the former rollover and deferral of gain upon the sale of an old residence was no longer dependent upon the purchase of replacement property. Rather, a permanent exclusion of gain became possible under new § 121. The repeal of § 1250(d)(7) requires that on sale of a residence, the additional depreciation must be recaptured as ordinary income under § 1250(a).

Taxpayers are required to recognize as ordinary income the gain attributable to additional depreciation for the property. Our inspection of the ACRS accelerated and straight line depreciation Tables shows that as of the beginning of , the additional depreciation subject to recapture under § 1250 should be approximately seven percent of the property's unadjusted depreciable basis. The amount subject to recapture thus should be about $2,300, assuming that the depreciable basis was $, the property was placed in service for the production of income in February 1985, and the taxpayer used the Tables for accelerated depreciation of 18-year real property placed in service after June 22, and before May 9, .[6]

Please call CC:ITA:4 at if you have any further questions.

[6] Taxpayers' returns have discrepancies that we are unable to resolve. The return indicates that Taxpayers depreciated the residence as 18-year ACRS property with a depreciable basis of $ and a placed in service date for the production of income of . Using these numbers, Taxpayers could have taken approximately $ of depreciation as of the beginning of . On the return, the sum of depreciation taken seems to be calculated using a depreciable basis of $ and a placed in service date of . The cumulative depreciation calculated using these numbers would be over $ as of the beginning of . On their original return the Taxpayers indicated that depreciation recapture was $20,936; our understanding was that the recapture amount was all of the depreciation taken, but we do not know how the $20,936 was determined.