

**COORDINATED ISSUE
SAVINGS AND LOAN INDUSTRY
SUPERVISORY GOODWILL¹
UIL 597.13-00**

ISSUES

1. Whether supervisory goodwill is covered by I.R.C. § 597.²
2. Whether taxpayers³ can establish a tax basis in supervisory goodwill.
3. Whether taxpayers are entitled to losses under I.R.C. § 165 with respect to supervisory goodwill based upon worthlessness, abandonment or confiscation.
4. Whether taxpayers are entitled to depreciation or amortization deductions under I.R.C. § 167 with respect to supervisory goodwill.

FACTS

Supervisory goodwill is a regulatory intangible created under special accounting rules used by the Federal Home Loan Bank Board (“FHLBB”) during the 1980s in connection with acquisitions of insolvent savings and loans and other similarly chartered institutions (“thrifts”), the deposits of which were insured by the Federal Savings and Loan Insurance Corporation (“FSLIC”). As a general matter, the Service does not recognize supervisory goodwill as an asset having tax basis.

Under the FHLBB’s rules, taxpayers were permitted to record the acquisitions for financial reporting purposes using the purchase method of accounting. Under this method, taxpayers booked the excess of their cost (including liabilities assumed) over the then fair market value of the assets acquired as purchased goodwill on their balance sheets. Taxpayers were also allowed under the FHLBB’s rules to count

¹ Various regulatory rights are often conveyed to a taxpayer in connection with the acquisition of an insolvent institution. For the years at issue, these rights often included (1) the right to use the purchase method of accounting for financial reporting purposes to record the acquisition, (2) the right to use supervisory goodwill to meet regulatory capital requirements, and (3) the right to operate branches across state lines (so-called “branching rights”). Regardless of the regulatory rights conveyed in connection with these acquisitions, the issues are similar and the tax analysis used herein is generally applicable.

² All references to statutory provisions (including § 597) are to applicable provisions of law in effect prior to the 1989 enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (“FIRREA”).

³ As used herein, taxpayer(s) may refer to the original acquirer of the insolvent institution, its successor in interest, its common parent, or a consolidated return group to which it belonged.

purchased goodwill (which was termed “supervisory goodwill” for regulatory purposes) towards meeting their regulatory capital requirements. For financial reporting and book purposes, purchased goodwill was amortized over a period not to exceed 40 years. The regulatory amortization period for supervisory goodwill, however, could be shorter.

Without the ability to count supervisory goodwill towards capital, many taxpayers would not have met their regulatory capital requirements after the acquisition. Upon enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the regulatory benefits associated with supervisory goodwill changed, and the taxpayers’ ability to count supervisory goodwill towards capital became subject to an accelerated five year phase out.

A number of taxpayers sued the federal government for damages arguing that FIRREA constituted a breach of contract for which damages were appropriate. They prevailed in the Supreme Court, which found that the federal government had breached these contracts. See United States v. Winstar Corp., 518 U.S. 839 (1996). The cases were remanded for a determination of appropriate damages. A number of these Winstar damages-related actions are still pending in the United States Court of Federal Claims.

Prior to FIRREA, taxpayers did not amortize or depreciate supervisory goodwill or claim losses based on the worthlessness, confiscation or abandonment of supervisory goodwill on their tax returns. After FIRREA, taxpayers began asserting that they had a tax asset called supervisory goodwill. Taxpayers claim that they have a tax basis in supervisory goodwill because it is property under § 597 of the Code and assistance under § 406 of the National Housing Act (“NHA”).⁴ Further, taxpayers now claim to have incurred losses under § 165 of the Code because supervisory goodwill was abandoned, confiscated, or made worthless as a result of FIRREA’s enactment.

In addition, some taxpayers are claiming depreciation or amortization deductions under I.R.C. § 167 for supervisory goodwill. Relying on Newark Morning Ledger Co. v. United States, 507 U.S. 546 (1993), these taxpayers claim that supervisory goodwill has an ascertainable value and a limited useful life which could be determined with reasonable accuracy after FIRREA’s enactment.

For federal income tax purposes, however, taxpayers treated the acquisitions as nontaxable reorganizations in accordance with I.R.C. §§ 368(a)(1)(G) and 368(a)(3)(D). Pursuant to I.R.C. § 362, they took a carryover basis in the acquired assets of the insolvent thrift. Because supervisory goodwill was not an asset of the insolvent thrift, it was not reflected on the taxpayers’ original federal income tax returns for the acquisition year.⁵

⁴ Section 406 of the NHA was codified at 12 U.S.C. § 1729.

⁵ The regulatory asset of supervisory goodwill corresponds to the book asset of purchased goodwill. However, there is no corresponding tax asset because the excess amount that was booked by taxpayers as purchased goodwill is already reflected in their higher carryover tax basis for the same assets.

Although taxpayers are asserting that they have a tax basis in supervisory goodwill, they have not actually established how that tax basis arose. Because of the tax-free reorganization treatment, all of the taxpayers' originally identified sources of tax basis were properly reflected in their carryover tax basis for the acquired assets at the time of the original acquisitions. In addition, supervisory goodwill is not money or other property provided by the FSLIC pursuant to § 406(f) of the NHA. Therefore, § 597 is also not available to provide taxpayers with a nontaxable source of tax basis in supervisory goodwill. As taxpayers have not identified any source for their alleged tax basis in supervisory goodwill, they are not entitled to any tax relief as a result of FIRREA's changes in the regulatory treatment of supervisory goodwill. The appropriate remedy, if any, for these taxpayers for any breach by the federal government with respect to supervisory goodwill is contract damages.

DISCUSSION OF ISSUES

Issue 1: Whether supervisory goodwill is covered by § 597.

Under § 597(a), a thrift's gross income did not include money or other property received from the FSLIC pursuant to § 406(f) of the NHA. A review of the legislative history of § 597 indicates that Congress intended § 597 to apply only to forms of financial assistance authorized by § 406(f) of the NHA. With respect to the provision ultimately enacted as § 597, the accompanying Conference Report states:

The bill excludes from income of [an insured thrift] all money or property contributed to the thrift institution by [the FSLIC] under its financial assistance program without reduction in basis of property. The amendment applies to assistance payments whether or not the association issues either a debt or equity instrument in exchange therefore. ...

H.R. Conf. Rep. No. 97-215, 97th Cong., 1st Sess. 284 (1981).

The types of financial assistance commonly available from the FSLIC under § 406(f) of the NHA included cash contributions, cash deposits, asset purchases, assumptions of liability, guarantees, and loans. As a general matter, these types of positive, tangible contributions from the FSLIC to the net worth of a thrift would be available to meet any future demands from depositors. Because of the types of tangible financial assistance expressly authorized under § 406(f) of the NHA, Congress could not intend § 597 to apply to any form of assistance other than transfers of money or similar property (for example, net worth notes) from the FSLIC.

Supervisory goodwill represents a form of regulatory forbearance that relieved taxpayers of otherwise applicable accounting and regulatory capital requirements. Because supervisory goodwill lacks independent value, it is not an asset available to meet the future demands of depositors. As it is not comparable to the types of financial

assistance described under § 406(f) of the NHA, supervisory goodwill is not money or other property for purposes of § 597.

In addition, § 597 requires that the FSLIC provide the assistance under § 406(f) of the NHA. Supervisory goodwill, however, resulted from grants of regulatory forbearance by the FHLBB, not the FSLIC.⁶ Even though the FSLIC was authorized to enter into assistance agreements in connection with the acquisitions at issue, it was the FHLBB from whom taxpayers sought and received permission to use the purchase method of accounting and to count any resulting goodwill towards their regulatory capital requirements as supervisory goodwill. Thus, supervisory goodwill is also not covered by § 597 because it was not provided by FSLIC.

Some taxpayers also now argue that the “right to use” supervisory goodwill towards regulatory capital requirements is the relevant property for purposes of § 597 of the Code. However, neither this right alone, nor in combination with the bundle of other rights comprising the regulatory forbearance conferred by the FHLBB, is covered by § 597. As discussed above, regulatory forbearance is not an asset of the type described in § 406(f) of the NHA, and it is not assistance provided by the FSLIC.

Supervisory goodwill (including those rights comprising the related regulatory forbearance) remains a creature of regulatory accounting. It is not assistance provided by FSLIC pursuant to § 406(f) of the NHA, and it not “money or other property” within the meaning of § 597. Consequently, supervisory goodwill is not covered by § 597.

Issue 2: Whether taxpayers can establish a tax basis in supervisory goodwill.

Special basis rules apply to assets and liabilities acquired in tax free reorganizations. Under these rules, taxpayers usually step into the shoes of the transferors and, generally, receive a carryover basis. I.R.C. § 362(b). Since supervisory goodwill was not reflected on the books of the insolvent thrift, taxpayers cannot establish a carryover basis for it. See I.R.C. §§ 357(a) and 1032(a).

Taxpayers identified and valued all of the assets and liabilities received in connection with these acquisitions at the time of the acquisition. Any additional consideration paid in connection with the acquisition was also allocated contemporaneously to the acquired assets. Taxpayers did not identify supervisory goodwill as a separate asset for tax purposes at the time of the acquisition. Taxpayers cannot now assert that any tax basis exists for it after FIRREA.⁷ Rather, taxpayers must affirmatively establish that

⁶ After Winstar, taxpayers also argue that the actions of FSLIC and FHLBB are interchangeable for purposes of § 406 of the NHA. The legislative history to § 597 and related contemporaneously enacted tax provisions, however, supports treating FSLIC and FHLBB as separate entities. Compare section 241 of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34 (Aug. 13, 1981) (“ERTA”) (in which Congress spoke to actions taken by either FSLIC or FHLBB) with sections 243 and 244 of ERTA (in which Congress spoke to actions taken solely by FSLIC). Section 597 was added by section 244 of ERTA.

⁷ This also holds true for the “right to use” supervisory goodwill which would be construed as “other property” for purposes of § 1012.

they have a tax basis in supervisory goodwill. See §§ 357(a), 362(b), and 1012(a); Treas. Reg. § 1.61-(2)(d).

Taxpayers have not established that they incurred any additional cost with respect to supervisory goodwill. Pursuant to I.R.C. § 1012, the tax basis of acquired property is usually its cost. According to Treas. Reg. § 1.1012-1(a), cost is the amount paid (in money or other property) for property. Absent certain provisions which provide for the tax free receipt of property, taxpayers generally must include in income the fair market value of property they receive in order to obtain a tax basis in such property.⁸ Treas. Reg. § 1.61-2(d). Taxpayers have not established a cost basis in supervisory goodwill.

Since taxpayers cannot point to any cost incurred in obtaining supervisory goodwill, and since they cannot assert a carryover tax basis in it, they may assert that they have a nontaxable source (such as § 597) from which to derive additional tax basis. However, because taxpayers have not established that at the time of the acquisition they had either a taxable or nontaxable source of tax basis for supervisory goodwill, they are not now entitled to claim that, after FIRREA, they have any tax basis in it.

Issue 3: Whether taxpayers are entitled to losses under § 165 with respect to supervisory goodwill based upon worthlessness, abandonment or confiscation.

After FIRREA, taxpayers began claiming tax losses based upon the worthlessness, abandonment or confiscation of supervisory goodwill and their right to use it to meet regulatory capital requirements. As discussed above, however, taxpayers are not entitled to any losses for supervisory goodwill because they lack tax basis in it. Even if a taxpayer could establish tax basis in supervisory goodwill, the deductible amount of any loss and the proper tax year for claiming such loss are not yet fixed.

Under § 165(a), a taxpayer is allowed a deduction for any loss sustained during the taxable year for which the taxpayer is not compensated by insurance or otherwise. Pursuant to § 165(b), the amount of the deduction is determined by reference to the taxpayer's adjusted basis under I.R.C. § 1011 for determining a loss from the sale or other disposition of property. But, before any loss is allowed as a deduction under § 165(a), it must be evidenced by "closed and completed transactions fixed by identifiable events." Treas. Reg. § 1.165-1(b). See also Treas. Reg. § 1.165-1(d); United States v. S.S. White Dental Mfg. Co., 274 U.S. 398, 401 (1927).

Worthlessness

As stated above, taxpayers have not established any tax basis in supervisory goodwill. Therefore, they do not have deductible tax losses under § 165(a). Assuming a taxpayer does have a tax basis in supervisory goodwill, that taxpayer can deduct a loss under

⁸ As discussed under Issue 1, § 597 does not apply to supervisory goodwill. Therefore, taxpayers cannot rely on § 597 to provide a nontaxable source for their asserted tax basis in supervisory goodwill.

§ 165 for it only in the year the loss is sustained and only to the extent the taxpayer is not compensated for that loss. Treas. Reg. § 1.165-1(a). If an event occurs that may result in a loss by a taxpayer and the taxpayer makes a claim for reimbursement for which a reasonable prospect of recovery exists, the taxpayer's loss is not considered to be sustained until the prospect of recovery can be ascertained with reasonable certainty. See Treas. Reg. § 1.165-1(d)(1) and (2)(i).

Whether a reasonable prospect for recovery exists is a factual issue, determined upon an objective examination of the facts and circumstances surrounding the loss as of the close of the taxable year in which the deduction is claimed. See Boehm V. Commissioner, 326 U.S. 287, 292-93 (1945); Ramsay Scarlett & Co. v. Commissioner, 61 T.C. 795, 811 (1974), aff'd, 521 F.2d 786 (4th Cir. 1975); Brown v. Commissioner, T.C. Memo. 1996-284. Thus, where a taxpayer is actively pursuing other remedies such as a lawsuit, and there exists a reasonable prospect for recovery by means of such remedies, the requirements of § 165 are not met. In such cases, the appropriate time for claiming a tax loss would be at the conclusion of the lawsuit (i.e., when there is a closed and completed transaction fixed by identifiable events which establish the proper taxable year and the amount of any loss). See Treas. Reg. § 1.165-1(d).

As noted above, many taxpayers are still pursuing their Winstar-type contract claims in litigation and, currently, they appear to have a reasonable prospect of success. See, e.g., California Fed. Bank v. United States, 43 Fed. Cl. 445 (1999), aff'd in part and vacated in part, 245 F.3d 1342 (Fed. Cir. 2001). Taxpayers filed these Winstar lawsuits seeking reimbursement for damages that arose out of the same events underlying the tax losses being claimed on their amended federal income tax returns. Because these taxpayers have a reasonable prospect for recovery in their Winstar cases, they have not sustained the claimed tax loss for worthlessness with respect to supervisory goodwill. See Ramsay Scarlett & Co, supra, at 812-13; Dawn v. Commissioner, 675 F.2d 1077, 1078 (9th Cir. 1982); Estate of Scofield v. Commissioner, 266 F.2d 154, 159 (6th Cir. 1959); Brown, supra. See also Boehm, supra, at 292-93; Jeppsen v. Commissioner, T.C. Memo. 1995-342, aff'd, 128 F.3d 1410 (10th Cir. 1997), cert. denied, 524 U.S. 916 (1998). Therefore, even assuming that a taxpayer establishes a tax basis in supervisory goodwill, the taxpayer cannot establish the amount of any deductible loss based on worthlessness or the proper tax year for claiming such loss while that taxpayer is pursuing Winstar-type litigation with respect to supervisory goodwill. The proper time for claiming such a loss would be when there is a closed and completed transaction fixed by identifiable events (such as the conclusion of the litigation).

Abandonment

Section 165 also permits taxpayers to deduct losses based on the abandonment of an asset used in a business or in a transaction entered into for profit. See, e.g., Treas. Reg. § 1.165-2. To find that a taxpayer has suffered an abandonment loss, there must be (1) an intention by the owner to abandon the asset and (2) an affirmative act of abandonment. A.J. Industries, Inc. v. United States, 503 F.2d 660, 670 (9th Cir. 1974);

Citron v. Commissioner, 97 T.C. 200, 209 (1991); CRST, Inc. v. Commissioner, 92 T.C. 1249, 1257 (1989), aff'd, 909 F.2d 1146 (8th Cir. 1990). Further, and as discussed above, the transaction must be closed and completed within the meaning of Treas. Reg. § 1.165-1(b). See Illinois Cereal Mills, Inc. v. Commissioner, T.C. Memo. 1983-469, aff'd, 789 F. 2d 1234 (7th Cir.), cert. denied, 479 U.S. 995 (1986). The taxable year in which such a loss is sustained need not be the taxable year in which the overt act of abandonment occurs. See Treas. Reg. § 1.165-2(a).

Intangible assets may be the subject of an abandonment loss. Parmelee Transportation Co. v. United States, 351 F.2d 619 (Ct. Cl. 1965). See also Massey-Ferguson, Inc. v. Commissioner, 59 T.C. 220 (1959), acq., 1973-2 C.B. 2; Solar Nitrogen Chemicals, Inc. v. Commissioner, T.C. Memo. 1978-486. Treas. Reg. § 1.165-2(a) provides that an abandonment loss with respect to a nondepreciable asset (including such historically nonamortizable intangible assets as goodwill) is allowable only in the taxable year in which such loss is sustained.

Generally, goodwill may not be abandoned until the business to which it relates ceases to operate. Thriftcheck Service Corp. v. Commissioner, 33 T.C. 1038 (1960), aff'd, 287 F.2d 1 (2^d Cir. 1961); Illinois Cereal Mills, Inc., supra. This is because until the related business has ceased to operate, the transaction is not considered to be "closed and completed" within the meaning of Treas. Reg. § 1.165-1(b). See Illinois Cereal Mills, supra. An exception to the general proscription against an early abandonment of items like goodwill can exist where the taxpayer abandons a portion of its business having a distinct transferable value. See Metropolitan Laundry Co. v. United States, 100 F.Supp. 803 (N.D. Cal. 1951)(taxpayer permitted to claim an abandonment loss on a portion of a customer list attributable to a particular geographic area).

The court in Metropolitan Laundry explained that while goodwill is not severable from the underlying ongoing business, it is possible that an ongoing concern can dispose of a portion of its business in a particular area, along with attendant goodwill, without completely ceasing operations. Thus, as long as the business and the goodwill disposed can be assigned a "distinct transferable value," the transaction can be considered "closed and completed" for tax purposes. Metropolitan Laundry, 100 F.Supp. at 806-07. In Massey-Ferguson, 59 T.C. at 225, the Tax Court followed Metropolitan Laundry, and held that the abandonment of an identifiable and severable intangible asset entitled the taxpayer to a currently deductible abandonment loss.⁹

Under § 165, an affirmative act of abandonment is required. The taxpayer's intent to abandon property standing alone is generally insufficient to establish an abandonment loss for § 165 purposes. See Brountas v. Commissioner, 692 F.2d 152 (1st Cir. 1982), cert. denied, 462 U.S. 1106 (1983), Beus, 261 F.2d at 180, Citron, 97 T.C. at 210; Zurn v. Commissioner, T.C. Memo. 1996-386. Moreover, abandonment does not

⁹ In Massey-Ferguson, the taxpayer argued that it had abandoned the use of the going concern value of a previously acquired business operation even though it continued to manufacture and distribute similar products under its own name after that time.

automatically result from the mere cessation of use of the asset by the taxpayer. Beus v. Commissioner, 261 F.2d 176, 180 (9th Cir. 1958).

Further, a taxpayer's participation in a government program requiring the taxpayer to cease certain operations will not be construed as an affirmative act of abandonment absent a showing of the requisite taxpayer intent to abandon the business. See Standley v. Commissioner, 99 T.C. 259 (1992), aff'd without published opinion, 24 F.3d 249(9th Cir. 1994). Additionally, restrictive actions by the government are generally construed to affect only the value of the property where the taxpayer continues to hold onto that property. See CRST v. Commissioner, 92 T.C. at 1259-61; Beatty v. Commissioner, 46 T.C. 835 (1966); and Consolidated Freight Lines, Inc. v. Commissioner, 37 B.T.A. 576 (1938), aff'd, 101 F.2d 813 (9th Cir.), cert. denied, 308 U.S. 562 (1939).

Following FIRREA, some taxpayers claimed abandonment losses under § 165 with respect to supervisory goodwill. As discussed above, because taxpayers have not established that they have a tax basis in supervisory goodwill or that they have otherwise met the requirements for deduction under § 165 with respect to it, they are not entitled to the claimed deductions. However, even if a taxpayer can establish a tax basis in supervisory goodwill and satisfy the other requirements of § 165, there must be an affirmative act of abandonment by the taxpayer. The mere diminution in the value of property is not enough to establish an abandonment loss. See Kraft Inc. v. United States, 30 Fed. Cl. 739, 785-86 (1994); Lakewood Associates v. Commissioner, 109 T.C. 450-56 (1997), aff'd without published opinion, 173 F.3d 850 (4th Cir. 1998); and S.S. White Dental, 274 U.S. at 401. Moreover, neither FIRREA's statutory provisions nor the government's subsequent regulatory curtailment of the ability to use supervisory goodwill to meet taxpayers' capital requirements constitutes an affirmative act of abandonment by a taxpayer.¹⁰

Confiscation

Some taxpayers have also argued that they are entitled to a § 165 loss because the government allegedly confiscated their property as a result of the FIRREA changes and, therefore, the "reasonable prospect of recovery" standard outlined above does not apply. This argument is based on United States v. S.S. White Dental Mfg. Co., 274 U.S. at 403, which allowed the taxpayer a deduction equal to its investment in a subsidiary that had been confiscated by the German government in 1918. In allowing the deduction, the Court pointed to the fact that the taxpayer could have no more than a remote hope of recovering its property from the wreck of war. The Court did not, however, discard the reasonable prospect of recovery standard for cases in which taxpayers do have a reasonable hope of recovery.

¹⁰ Generally, for purposes of claiming an abandonment loss with respect to supervisory goodwill, taxpayers have argued that the tax asset of supervisory goodwill is akin to the residual value remaining after all other assets acquired in connection with the insolvent thrift's acquisition have been identified, valued and lifted. The result of this argument is that supervisory goodwill resembles the tax asset of goodwill (referred to as "residual goodwill" under Issue 4 below).

Unlike the taxpayer in S.S. White Dental Manufacturing, taxpayers pursuing Winstar-type contract claims have a reasonable prospect of recovery for contract damages. The Supreme Court in Winstar stated that the petitioners there were entitled to damages. Similarly situated taxpayers would have equally viable prospects. Thus, the prospect of recovery for taxpayers in these supervisory goodwill cases cannot be deemed so remote a hope as that facing the taxpayer in S.S. White Dental Manufacturing. Where the prospect of recovery is reasonably certain, the mere existence of facts supporting a cause of action has been held sufficient to bar a loss deduction. Premji v. Commissioner, T.C. Memo. 1996-304, aff'd without published opinion, 139 F.3d 912 (10th Cir. 1998).

Thus, even if a taxpayer can establish that it had a tax basis in supervisory goodwill, that taxpayer would generally not be able to establish that it is entitled to a deductible loss under § 165(a) based upon worthlessness, abandonment, or confiscation for the reasons set forth above.

Issue 4: Whether taxpayers are entitled to depreciation or amortization deductions under I.R.C. § 167 with respect to supervisory goodwill.

Taxpayers are not entitled to depreciation or amortization deductions under § 167 with respect to supervisory goodwill (which corresponds to residual goodwill).¹¹ Section § 167(a) provides a deduction for a reasonable allowance for the exhaustion, wear and tear (including obsolescence) of property used in a trade or business including intangibles. See Treas. Reg. § 1.167(a)-3. However, Treas. Reg. § 1.167(a)-3 also provides that no depreciation deduction is allowable for such residual goodwill. This regulation further states that intangible assets which do not have a limited useful life are not subject to the depreciation deduction and that no allowance will be permitted "merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life."

Moreover, a mere diminution in value, even over an identifiable period (such as the 5 year phase out of the right to count supervisory goodwill towards certain regulatory capital requirements) does not suffice to establish a limited useful life for a residual intangible such as the regulatory accounting asset of supervisory goodwill. Thus, taxpayers are not entitled to depreciation or amortization deductions under § 167 with respect to supervisory goodwill. Even if the regulations did not prohibit such a depreciation or amortization deduction, since taxpayers cannot establish a tax basis in supervisory goodwill they are not entitled to § 167 amortization deductions with respect thereto. As explained above in Issue 2, taxpayers have not established a tax basis in supervisory goodwill (including the right to use it). Since taxpayers lack a tax basis in supervisory goodwill, their depreciable basis is zero pursuant to I.R.C. §§ 167(c)(1), 1011, and 1016 and Treas. Reg. § 1.167(g)-1.

¹¹ See footnote 10 above for further clarification of the use of the phrase "residual goodwill" in this context.

Further, even if a taxpayer could establish a tax basis in supervisory goodwill in excess of zero, that taxpayer must still satisfy the requirements of Newark Morning Ledger Co. v. Unites States, 507 U.S. 546 (1993). Once an intangible has been identified, Newark Morning Ledger requires that the value of that asset be ascertained (for basis) and its useful life be reasonably determined. As shown above, taxpayers cannot meet these tests with respect to the residually determined supervisory goodwill. Moreover, the determinations of value and useful life must be based upon information available to the taxpayer at the time of the transaction. Banc One v. Commissioner, 84 T.C. 476 (1985), aff'd without published opinion, 815 F.2d 75 (6th Cir. 1986). A subsequent change from no determinable useful life to a limited remaining useful life is not a mere change in useful life for purposes of § 167. Rather, such a change is a change in the nature of the asset.

Finally, even assuming that a taxpayer establishes a tax basis in excess of zero and otherwise satisfies Newark Morning Ledger's requirements, if the taxpayer is changing the treatment of supervisory goodwill from non-depreciable to depreciable, that change constitutes a change in method of accounting requiring the Commissioner's consent. Under § 446(e) and the regulations thereunder, the taxpayer must obtain permission to change prior to making the change. That is, taxpayers are not entitled to make retroactive method changes with respect to supervisory goodwill. Except in specifically authorized situations, an accounting method cannot be changed by a taxpayer's filing of an amended return as that would constitute a retroactive method change. See, e.g., Rev. Rul. 90-38, 1990-1 C.B. 57. Thus, the taxpayer is not entitled to deductions under § 167 attributable to supervisory goodwill that result from the taxpayer's attempt to make such a retroactive change in method on an amended return.

CONCLUSIONS

- Issue 1:** Supervisory goodwill is a creature of regulatory accounting and is not FSLIC financial assistance under § 406(f) of the NHA (as codified at 12 C.F.R. § 1729(f)). Therefore, supervisory goodwill does not qualify as “money or other property” under § 597.
- Issue 2:** Taxpayers cannot establish that they have a tax basis in supervisory goodwill because, generally, thrift acquisitions were tax free transactions and the taxpayers took a carryover basis in the acquired assets. Consequently, no basis was assigned to regulatory intangibles such as supervisory goodwill at the time of the acquisitions. Further, the taxpayers’ assertion of tax basis on Forms 1120X is insufficient to establish that tax basis in supervisory goodwill exists.
- Issue 3:** Since taxpayers cannot establish that tax basis in supervisory goodwill exists, they are not entitled to § 165 losses based upon worthlessness, abandonment or confiscation. Moreover, even if a taxpayer were able to establish a tax basis in supervisory goodwill, that taxpayer must affirmatively establish that it met the other requirements of § 165 for the loss as claimed in the tax years for which the amended returns were filed.
- Issue 4:** Taxpayers cannot establish a tax basis in supervisory goodwill and, therefore, they are not entitled to deductions under § 167 for depreciation or amortization with respect to supervisory goodwill. Even if a taxpayer could establish a tax basis in supervisory goodwill, that taxpayer must affirmatively establish that it satisfied Newark Morning Ledger’s requirements before it would be entitled to such deductions. However, even if a taxpayer could satisfy all of the requirements with respect to supervisory goodwill, the taxpayer is not entitled to deductions under § 167 with respect to supervisory goodwill that result from the taxpayer’s use of an amended return to effectuate an impermissible retroactive change in method of accounting.