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to: Gaming Industry Counsel, CC:LB&I:CTM:LA:2
(Large Business & International)

from: Branch Chief, Branch 7
(Income Tax & Accounting)

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subject: Asset Class and Recovery Period for Floating Gaming Facility

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Taxpayer =

Act =

Commission =

State =

Date1 =

Date2 =

Date3 =

Date4 =

Date5 =

Date6	=	
Date7	=	
Date8	=	
Date9	=	
Date10	=	
Date11	=	
Date12	=	
Date13	=	
Date14	=	
B	=	
C	=	
D	=	
E	=	
F	=	
G	=	
X	=	
<u>a</u>	=	
<u>b</u>	=	
<u>c</u>	=	
<u>d</u>	=	
<u>e</u>	=	
<u>f</u>	=	
<u>g</u>	=	

h	=
i	=
j	=
k	=
l	=
m	=
n	=
o	=
p	=
q	=
r	=
s	=
t	=
u	=
aa	=
$v	=
$w	=
x	=
y	=
z	=

ISSUE

What is the appropriate asset class and recovery period of Taxpayer's floating gaming facility?

CONCLUSION

Taxpayer's floating gaming facility is classified as nonresidential real property under § 168(e) of the Internal Revenue Code and, thus, has a recovery period of 39 years for purposes of § 168(a) and a recovery period of 40 years for purposes of § 168(g).

FACTS

The Act, effective Date1, authorized the Commission to issue licenses for the express purpose of riverboat gambling in State. Land-based gaming operations are prohibited in State. On Date2, the Commission issued a license to Taxpayer for a riverboat to be located in B.

In Date3, Taxpayer cut a basin alongside C to accommodate a riverboat casino. This basin is known as the D. The D discharges into C which discharges into E. The D includes a graving dock which was used to construct F, a floating gaming facility that was placed in service by Taxpayer on Date4. Although the waters in C and the D were connected, F was physically unable to enter C and, as result, F remained in the D.

In Date5, the spit of land between C and the D was removed in the northern portion of the D for the purpose of constructing a bulkhead and cofferdam system. The purpose was to enlarge that portion of the D to allow the construction of a new larger floating gaming facility,G, and to enable G to take the place of F and attach to a land-based pavilion. Although the bulkhead did not fully enclose the D such that it was still connected to C, G was physically unable to enter C and, as a result, G remained in the D.

The initial dimensions of the D were approximately a feet wide by b feet long. By removing the spit of land and constructing a bulkhead, the width of the northern portion of the D (about c feet long) was increased to approximately d feet. The opening at the end of the bulkhead connecting the D to C measured about e feet long. The depth of the D is approximately f feet. In contrast, C in this area is approximately g to e feet wide with a depth of h to i feet.

The G was designed by a marine architect and was built by a leader in the marine industry. The G was constructed on-site at the graving dock and, after the construction was completed, was motored approximately j feet within the D to its current position where it is attached to the pavilion. The dimensions of the G are k feet long by l feet wide and m feet high with a designed draft (depth) of i to n feet. The G weighs more than o tons and is larger than a football field. Accordingly, the G was confined to the northern portion of the D.

The G may carry over p guests and crew members. It offers more than q square feet of gaming space on a single deck. In addition to the gaming area, there is another r square feet of back-of-house and riverboat support space on multiple decks. On Date6, the G motored into position adjoining the pavilion, essentially replacing the F. The F was motored from its position adjoining the pavilion to the southern portion of the D where it was dismantled in-place. On Date7, Taxpayer placed the G in service at a cost of $v.

While the G has not navigated since it was motored into position in Date8, it has complied with the applicable requirements of the Commission, as well as the United States Coast Guard ("USCG"). The G is self propelled with a jet drive propulsion system rated for a combined total of aa horsepower. Utility systems have been designed such that the G is capable of operating tethered to shore-based systems, operating independent of the shore (although it was confined to the northern portion of the D), or a combination of the two. On-board power is generated by four X engine generator sets.

Additionally, all heating and cooling systems, plumbing, and sanitary waste can be operated independently of the tether. The G has independent navigation systems and ship-to-shore communication systems. The G employee compliment includes licensed marine and vessel support personnel (1 master, 1 mate, 1 engineer, 6 deckhands, and 1 other, per the Certificate of Inspection), contains over p life preservers, and is fueled per USCG procedures.

The G is affixed by hydraulic mooring claws to inherently permanent moorings on the land. Several lines also are used to attach the G to inherently permanent moorings on the land to ensure that the G does not move from its place. A weather seal also attaches the G to the pavilion around the openings to prevent exposure to the elements. The G is attached to land-based utilities through a series of wires, lines, cables, and hoses.

Once settled into its current position and placed in service, however, the G has not in fact been moved. Patrons must traverse the pavilion in order to get to the G. That is, the only way to board the G is via an opening connected to the pavilion. Thus, openings in the side of the G were designed from the outset to match up with openings in the pavilion so that patrons could walk seamlessly from the pavilion to the G. In fact, the main opening is over n feet high and s feet wide. Taxpayer represented that it has no intention of ever moving the G unless State law would require them to move it.

The G is a structure enclosing a space within its walls and is covered by a roof. In fact, there is nearly t square feet of usable space enclosed by the G. Further, the G provides working space for its gaming operations. The G houses the casino that is the major focus of the property and adds considerable space to the pavilion. In fact, the square footage of usable space on the G exceeds that of the pavilion. The pavilion is a u square foot structure that contains restaurants, shops, and gaming-related facilities.

Taxpayer owns the land on which the dock, including the pavilion and inherently permanent moorings, is located and to which the G is affixed.

With regard to the removal of the G from the pavilion, Taxpayer maintains that the G can be unmoored from the dock in less than one hour. To free itself from the dock, however, the crew needs to contact the local authorities, bring the ship's generator online, secure shore power, power up its propulsion, test its propulsion, transfer propulsion control to the pilothouse, break the weather seal between the G and the pavilion, disconnect shore power cables, disconnect data and communication lines, stop embarkation and disembarkation of patrons, stanchion off the boarding area, station crew members at boarding areas, secure crew entrance ramps, remove pins from the fore and aft mooring claws, open the hydraulic mooring claws, and remove wires and lines when instructed. Upon its removal, the G itself will not sustain much actual damage upon its removal.

In Date9, the State General Assembly passed a tax restructuring measure that made a number of dramatic changes in state and local taxation. Included in the restructuring was a provision that allowed riverboats to adopt flexible boarding, also known as dockside gaming. Prior to this, riverboats were required to cruise, or operate as if they cruised. The casino's doors were closed to entrants for the length of the cruise, whether or not the boat left the dock. With flexible boarding, a riverboat was allowed to remain dockside with its doors open. Patrons may enter at any time they wish. The F requested permission and began flexible boarding on Date10. The G utilized flexible boarding from the time it was initially placed in service.

Under the gaming tax regime, a riverboat was required to pay an Admissions Tax of $w per patron. Prior to flexible boarding, all the patrons of each cruise were counted as new admissions for the Admissions Tax, even if the patron simply remained on the boat for more than one cruise. After flexible boarding, only turnstile admissions were counted for purposes of the Admissions Tax (i.e., no additional tax was required for patrons who previously remained on the boat for more than one cruise). Also, under the gaming tax regime, a riverboat was required to pay a Wagering Tax. Prior to flexible boarding, the Wagering Tax was a flat x percent of adjusted gross receipts. After flexible boarding, the graduated Wagering Tax rates were instituted that ranged from y percent to z percent, depending on the amount of adjusted gross receipts generated. Taxpayer pays State taxes for the G based on the flexible boarding criteria.

Although the G adopted flexible boarding, engaged in dockside gaming, and did not ever cruise, gaming operations conducted on riverboat casinos could be lost from service for a variety of reasons, including casualty, forces of nature, mechanical failure, or extended or extraordinary maintenance. It was therefore incumbent on the owners of riverboat casinos to comply with USCG requirements regarding boat design, on-board facilities, equipment, personnel, and safety. Indeed, the G possessed valid Certificates of Inspection ("COIs") from the USCG dating back to its construction even before the G was initially placed in service. Pursuant to the COI, the operation of the G was limited to certain protected waters of C (essentially, the D).

On June 21, 2004, the USCG published a notice of proposed policy in the Federal Register (69 FR 34385) regarding the inspection of permanently moored vessels. The USCG proposed a policy of no longer issuing COIs to permanently moored vessels and no longer inspecting such vessels that had a COI. Subsequently, on May 11, 2009, the USCG published a notice of policy in the Federal Register (74 FR 21814) stating that it will no longer inspect permanently moored craft or issue COIs to such craft unless the craft demonstrates that it is a vessel capable of being used as a means of transportation on water.

As stated in the May 11, 2009, notice of policy, the USCG noted that it revised its policy in light of Stewart v. Dutra Construction Co., Inc., 543 U.S. 481 (2005). In Stewart, the U.S. Supreme Court stated that in determining whether a particular craft is also a vessel for purposes of 1 U.S.C. § 3, the "question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." Id., at 496. The USCG stated that Stewart implies that a "permanently moored vessel" is an oxymoron, since such a craft is neither used nor practically capable of being used as transportation on water, and therefore cannot be considered a vessel. Pursuant to Stewart, the USCG would apply the single test of whether a craft is used, or is practically capable of being used, as a means of transportation on water.

On Date11, the USCG sent a letter to Taxpayer stating that it will discontinue the inspection (for certification) of dockside riverboat casinos, including the G, on Date12. The USCG also sent a letter to the Commission to alert them to the impending change of the G's inspection status. The letter to the Commission noted that "The purpose of a riverboat casino is to provide a venue for gaming that would not be allowed on land by State law. Since your State's adoption of flexible scheduling none of these riverboat casinos have been used for the transportation of passengers; a premise to remain under Coast Guard jurisdiction. It is clear that the intent of these purpose-built riverboat casinos is not transportation but for lawful gaming within a State. We have observed over the past several years that these dockside riverboat casinos have taken on the attributes of buildings to such a degree that the Coast Guard should no longer be the primary guarantor of their fitness for public use."

After Taxpayer protested the determination by the USCG, the Commander of the Ninth Coast Guard District responded by letter dated Date13, "I have determined that the structure is an indefinitely moored, shore-side, floating casino and not a vessel requiring certification by the Coast Guard. In arriving at this determination, I have considered the overall operations and found the following: $ Its use is solely as an indefinitely moored floating casino. $ Its operations are entirely gaming-related and not maritime in nature. $ It is not in the business of transporting passengers, cargo or equipment. $ It is not a vessel in navigation and is essentially moored in a moat. The location of the casino in a cut of [C] and its physical size precludes the movement of the casino into [C]. $ It has never been used as a seagoing vessel and has been under flexible scheduling since its opening in [Date8]. The above observations lead to the conclusion that the structure does not meet the definition of a vessel in Title 1, United States Code § 3 and, as such, falls outside Coast Guard jurisdiction."

In a letter dated Date14, Taxpayer stated its intention to not indefinitely renew the COI for the G located in B. Rather, Taxpayer stated that it intended to transition inspection of the craft to State.

LAW AND ANALYSIS

Section 167(a) provides that there is allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in a trade or business or held for the production.

The depreciation deduction provided by § 167(a) for tangible property placed in service after 1986 generally is determined under § 168. This section prescribes two methods of accounting for determining depreciation allowances: (1) the general depreciation system in § 168(a); and (2) the alternative depreciation system in § 168(g). Under either depreciation system, a taxpayer computes the depreciation deduction by using a prescribed depreciation method, recovery period, and convention.

The applicable recovery period for purposes of either § 168(a) or 168(g) is determined by reference to class life or by statute. Section 168(i)(1) defines the term "class life" as meaning the class life (if any) that would be applicable with respect to any property as of January 1, 1986, under § 167(m) (determined without regard to § 167(m)(4) and as if the taxpayer had made an election under § 167(m)) as in effect on the day before the date of enactment of the Revenue Reconciliation Act of 1990. Former § 167(m) provided that in the case of a taxpayer who elected the asset depreciation range (ADR) system of depreciation, the depreciation allowance was based on the class life prescribed by the Secretary that reasonably reflected the anticipated useful life of that class of property to the industry or other group.

Section 1.167(a)-11(b)(4)(iii)(b) of the Income Tax Regulations provides rules for classifying property under former § 167(m). Property is included in the asset guideline class for the activity in which the property is primarily used. Further, property is classified according to primary use even though the activity in which such property is primarily used is insubstantial in relation to all the taxpayer's activities.

Rev. Proc. 87-56, 1987-2 C.B. 674, sets forth the class lives of property that are necessary to compute the depreciation allowances under § 168. The revenue procedure establishes two broad categories of depreciable assets: 1) asset classes 00.11 through 00.4 that consist of specific assets used in all business activities; and 2) asset classes 01.1 through 80.0 that consist of assets used in specific business activities. The same item of depreciable property can be described in both an asset category (asset classes 00.11 through 00.4) and an activity class (asset classes 01.1 through 80.0), in which case the item is classified in the asset category. See Norwest Corp. & Subs. v. Commissioner, 111 T.C. 105 (1998) (item described in both an asset and an activity category should be placed in the asset category).

I. Whether the G is a vessel for purposes of depreciation.

Asset class 00.28, Vessels, Barges, Tugs, and Similar Water Transportation Equipment, except those used in marine construction, of Rev. Proc. 87-56 does not include any further description for this class. Assets described in asset class 00.28 have a recovery period of 10 years for purposes of § 168(a) and 18 years for purposes of § 168(g).

Section 7701(o)(1)(7), as in effect on the day before the enactment of the Health Care and Education Reconciliation Act of 2010, refers to 1 U.S.C. § 3 for the definition of “vessel.” That section provides: The word “vessel” includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

The U.S. Supreme Court addressed the definition of a “vessel” in 1 U.S.C. § 3 in the case of Stewart v. Dutra Construction Co., 543 U.S. 481 (2005). In Stewart, an employee of a dredge sued his employer under the Jones Act[1] for injuries suffered while working on the dredge. The Supreme Court held that 1 U.S.C. § 3 provides the controlling definition of the term “vessel” for purposes of the Jones Act and throughout the U.S. Code. Stewart, at 489-90. The statute merely codified the meaning that the term “vessel” had acquired in general maritime law. Id., at 490. Essentially, “a ‘vessel’ is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.” Id., at 497.

The Court determined that “a watercraft is not ‘capable of being used’ for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.” Id., at 494. The Court elaborated that there is no separate “in navigation” requirement for a vessel; rather “the ‘in navigation’ requirement is an element of the vessel status of a watercraft.” Id., at 496. This distinguishes it from other “vessels” that have been “taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport.” Id., at 496.

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[1] The Jones Act, also known as the Merchant Marine Act of 1920, is currently codified at 46 U.S.C. § 30104. The general purpose of the Jones Act is to provide heightened legal protection to seamen injured in the course of employment. Among other benefits, workers who qualify as Jones Act seamen may sue their employer directly in a civil action for negligence or for a vessel's unseaworthiness.

On March 12, 2001, the Internal Revenue Service issued an Industry Specialization Program Coordinated Issue Paper, entitled "CLASS LIFE OF FLOATING GAMING FACILITIES UIL 168.20-07 ("CIP"). The CIP considered the appropriate asset classes and recovery periods of floating gaming facilities. The CIP described two contrasting gaming facility fact patterns and noted that although the fact patterns involved a casino riverboat and a casino facility-in-a-moat, the analysis is equally applicable to permanently moored facilities and facilities located behind cofferdams. Appendix A of the CIP provided a non-exclusive list of factors for determining whether a floating gaming facility is "otherwise ready and available" for use as a vessel described in asset class 00.28.

There are 20 factors identified in Appendix A of the CIP for determining whether a floating gaming facility is "otherwise ready and available" for use as a vessel described in asset class 00.28: 1) registered with U.S. Coast Guard or similar governmental authority; 2) certified by the Coast Guard as a seaworthy vessel; 3) periodically surveyed by a shipping classification society, such as the American Bureau of Shipping (ABS) with the classification "active"; 4) designed by a marine architect; 5) built in a shipyard and not by a general contractor; 6) a "plimsoll" or loadline welded onto the hull where the water line is located; 7) carries life preservers; 8) qualifies for § 7518 Marine Capital Construction Fund (CCF) administered by Maritime Administration (MARAD); 9) qualified for a Title XI guarantee mortgage by MARAD; 10) self-propelled and maintains its own independent utilities, such as electric, water and sewage system; 11) propelled by motorized vessels (pushed or towed); 12) has an independent navigation system; 13) communication is generally ship to shore; 14) employees are required to have specific active types of licenses and are certified for such positions as ship captain, 1st officer, radio officer, engineer officer 1st mate, etc.; 15) certain functions require U.S. Coast Guard Stamps (i.e. taking on fuel on a vessel require persons in charge, Red Baker flag must be flown while bunkering the vessel); 16) document charter parties are covered under marine admiralty law; 17) insurance of shipboard employees is under Jones Act Trade; 18) carries hull and marine insurance issued by an Inland Marine Underwriters Association; 19) on mortgaged vessels there are certain assurances regarding the mortgage such as the "Preferred Ship Mortgage Act of 1920"; and 20) flies a flag of the nation in which the vessel is registered.

During the years at issue, the G satisfied some of the factors listed in Appendix A of the CIP that would be indicative of it being a vessel. Namely, it was designed by a marine architect, follows USCG procedures such as taking on fuel by a person in charge and flying the Red Baker flag while bunkering, is secured by a first preferred ship mortgage, and flies a flag of the nation in which the vessel is registered. However, the G did not satisfy other factors listed in Appendix A of the CIP such as it was not built in a shipyard, does not have a plimsoll or loadline welded onto the hull, was not listed as "active" with the American Bureau of Shipping, does not qualify for a Title XI guaranteed mortgage by the Maritime Administration (MARAD), and does not carry insurance for employees under the Jones Act.

While the list of factors in Appendix A of the CIP is non-exclusive and no one factor is necessarily determinative, the first two factors listed in Appendix A appear to deserve greater weight, namely that it is registered and certified by the USCG. Because the USCG has jurisdiction over all vessels operating within the United States, additional weight should be placed upon determinations made by the USCG. As stated in the Facts section of this memorandum, the USCG stated that the G was "an indefinitely moored, shore-side, floating casino and not a vessel requiring certification by the Coast Guard." Further, the USCG stated that the G "does not meet the definition of a vessel in Title 1, United States Code § 3 and, as such, falls outside Coast Guard jurisdiction."

Based on the opinion in the Stewart case and the USCG determinations about the G, the G is not a vessel for purposes of depreciation. Pursuant to Stewart, 1 U.S.C. § 3 provides the controlling definition of the term "vessel" throughout the U.S. Code, including the Internal Revenue Code (see § 7701(o)(1)(7)). Essentially, a vessel is any watercraft practically capable of maritime transportation. A watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement. The USCG determined that the G is permanently moored and does not meet the definition of a vessel in 1 U.S.C. § 3. Accordingly, the G is not considered a vessel for purposes of asset class 00.28 of Rev. Proc. 87-56.

II. Whether the G is classified as nonresidential real property or in asset class 79.0 of Rev. Proc. 87-56.

Because the G is not an asset described in asset class 00.28 of Rev. Proc. 87-56, the next issue is whether the G is classified as nonresidential real property or in asset class 79.0 of Rev. Proc. 87-56.

Asset class 79.0, Recreation, of Rev. Proc. 87-56 includes assets used in the provision of entertainment services on payment of a fee or admission charge, as in the operation of bowling alleys, billiard and pool establishments, theaters, concert halls, and miniature golf courses, but does not include buildings which house the assets used in entertainment services. Assets used primarily in asset class 79.0 have a recovery period of 7 years for purposes of § 168(a) and 10 years for purposes of § 168(g). The CIP states that asset class 79.0 includes gaming activities.

Section 168(e)(2)(B) defines "nonresidential real property" as section 1250 property which is not residential rental property, or property with a class life of less than 27.5 years. Nonresidential real property has a recovery period of 39 years for purposes of § 168(a) and 40 years for purposes of § 168(g).

Section 168(i)(12) provides that the terms "section 1245 property" and "section 1250 property" have the same meanings given such terms by §§ 1245(a)(3) and 1250(c), respectively.

Section 1250(c) defines the term “section 1250 property” as meaning any real property (other than section 1245 property, as defined in § 1245(a)(3)) that is or has been property of a character subject to the allowance for depreciation provided in § 167. Section 1.1250-1(e)(3)(i) provides that the term “section 1250 property” includes three types of depreciable real property. One type is a building or its structural components within the meaning of § 1.1245-3(c). Pursuant to § 1.1245-3(c)(2), the terms “building” and “structural components” have the meanings assigned to those terms in § 1.48-1(e).

Pursuant to § 1.48-1(e)(1), the term “building” generally means any structure or edifice enclosing space within its walls, and usually covered by a roof, the purpose of which is, for example, to provide shelter or housing, or to provide working, office, parking, display or sales space. The term includes, for example, apartment houses, factory and office buildings, warehouses, barns, garages, railway or bus stations, and stores. Such term includes any such structure constructed by or for a lessee even if such structure must be removed or ownership of such structure reverts to the lessor at the termination of the lease.

Factors to consider in determining whether a structure is a building include the appearance of the structure, the function of the structure, and inherent permanency. See L.L. Bean, Inc. v. Commissioner, T.C. Memo. 1997-175. For determining whether a structure is inherently permanent, the court in Whiteco Industries, Inc. v. Commissioner, 65 T.C. 664, 672-73 (1975), set forth six factors to consider. These factors are:

(1) Is the property capable of being moved, and has it in fact been moved?
(2) Is the property designed or constructed to remain permanently in place?
(3) Are there circumstances, which tend to show the expected or intended length of affixation, i.e., are there circumstances, which show that the property may or will be moved?
(4) How substantial a job is removal of the property and how time consuming is it; is it readily removable?
(5) How much damage will the property sustain upon its removal?
(6) What is the manner of affixation of the property to the land?

If the G is determined to be an inherently permanent structure and meets the appearance and function factors in § 1.48-1(e)(1), the G would be classified as nonresidential real property under § 168(e)(2). Asset class 79.0 does not include buildings.

From the facts provided, the G meets the appearance and function factors found in § 1.48-1(e)(1). The G is a structure enclosing a space within its walls and covered by a roof. In fact, there is nearly t square feet of usable space enclosed by the G. Further, the purpose of the G is to provide working space for its gaming operations. In fact, the G has been certified to be able to carry over p guests and crew members. Thus, the G clearly meets the appearance and function tests.

The fact that the G is permanently moored as determined by the USCG is not, by itself, determinative that the G is an inherently permanent structure for depreciation purposes. Such determination is made by application of the Whiteco factors.

With regard to the first factor, is the property capable of being moved and has it in fact been moved, the G was initially designed to be capable of being moved. Indeed, once it was fully constructed, it was moved approximately j feet from its place of construction to its current position attached to the pavilion where it is indefinitely moored. Once settled into its current position and placed in service, however, the G has not in fact been moved. Taxpayer represented that it has no intention of ever moving the G unless State law would require them to move it. Although the G has not been moved since its placed-in-service date, the G is capable of being moved. This factor favors Taxpayer.

For the second factor, is the property designed or constructed to remain permanently in place, the G was designed as an addition to be attached to the land-based pavilion, which contains restaurants, shops, and gaming-related facilities. Patrons must traverse the pavilion in order to get to the G. That is, the only way to board the G is via an opening connected to the pavilion. The G was designed and constructed with numerous large openings in its side to match up with openings in the pavilion and allow patrons and employees to walk seamlessly from the pavilion to the G. In fact, the main opening is over n feet high and s feet wide. The G was designed to remain docked permanently and not move from its location; otherwise the openings on the G would no longer be congruent with the openings in the pavilion. This factor favors the Service.

With regard to the third factor, circumstances which tend to show the expected or intended length of affixation, the G is securely moored to the dock and does not float free in the D. Taxpayer owns the land to which the dock is affixed. Further, Taxpayer represented that it has no intention of ever moving the G unless State law would require them to move it. Thus, openings in the side of the G were designed from the outset to match up with openings in the pavilion so that patrons could walk seamlessly from the pavilion to the G. It is clear that the G was designed in a manner that Taxpayer intended and expected it to remain in place permanently. This factor favors the Service.

For the fourth factor, how substantial a job is removal of the property and how time consuming is it, Taxpayer maintains that the G can be unmoored from the dock in less than one hour. To free itself from the dock, however, the crew needs to contact the local authorities, bring the ship's generator online, secure shore power, power up its propulsion, test its propulsion, transfer propulsion control to the pilothouse, break the weather seal between the G and the pavilion, disconnect shore power cables, disconnect data and communication lines, stop embarkation and disembarkation of patrons, stanchion off the boarding area, station crew members at boarding areas, secure crew entrance ramps, remove pins from the fore and aft mooring claws, open the hydraulic mooring claws, and remove wires and lines when instructed. It does not seem plausible that all of these items could be done in less than one hour as Taxpayer attests. Moreover, because there was never any intent that the G be moved once it was placed in service, it is likely that a significant amount of silt has built up around the G such that dredging will need to be performed for the G to be moved at all. Dredging the D will require a substantial amount of time and effort. This factor is inconclusive.

With regard to the fifth factor, how much damage will the property sustain upon its removal, the G itself will not sustain much actual damage upon its removal. However, as explained above, the G has numerous large openings in its side leaving it vulnerable to weather and the elements. The weather seal connecting the G to the pavilion likely will be ruined in the process of removal. Additionally, the numerous large openings in the pavilion will also leave it vulnerable to weather and the elements. This factor favors Taxpayer.

For the sixth factor, what is the manner of affixation of the property to the land, the G is affixed by hydraulic mooring claws to inherently permanent moorings on the land. Several lines also are used to attach the G to inherently permanent moorings on the land to ensure that the G does not move from its place. A weather seal also attaches the G to the pavilion around the openings to prevent exposure to the elements. The G is attached to land-based utilities through a series of wires, lines, cables, and hoses. The G is a fully integrated addition to the land-based pavilion. Both the G and the pavilion were planned and designed with the integration of the two in mind. Moreover, the construction and the integration of the G demonstrate the expectation that the G would remain in place indefinitely. This factor favors the Service.

Based on a totality of the Whiteco factors, we conclude that the G is an inherently permanent structure. As stated previously, the G also meets the appearance and function tests. Consequently, the G is a building under § 1.48-1(e)(1). As such, the G is classified as nonresidential real property under § 168(e)(2) and, thus, has a recovery period of 39 years for purposes of § 168(a) and 40 years for purposes of § 168(g).

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

[redacted]

It is unclear whether the CIP has been superseded by the U.S. Supreme Court's decision in Stewart which was issued subsequent to the effective date of the CIP. As stated in the May 11, 2009, notice of policy, the USCG noted that "The Supreme Court's decision ended the prior situation, under which various circuit courts of appeal had applied different tests to determine whether a particular craft constituted a vessel, depending on the statute to be construed and the facts of the case … After *Stewart*, however, it is clear that we must apply the single test of whether a craft is used, or is practically capable of being used, as a means of transportation on water." Regardless, under either Stewart or the CIP, we think that a court would determine the G is not a vessel for depreciation purposes.

[redacted] It is possible, [redacted], that a court could determine that the G is not an inherently permanent structure based on the Whiteco factors. In such a case, because the G is not a vessel, it would necessarily be defined as tangible personal property used in the gaming industry. Thus, the G would be described in asset class 79.0 of Rev. Proc. 87-56 and would have a recovery period of 7 years for purposes of § 168(a) and 10 years for purposes of § 168(g).

Although we conclude that the G is a building, [redacted]

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-4930 if you have any further questions.