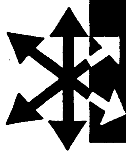

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A Periodic Update of Essential Tax Information

DEALER TAX WATCH

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DEALER TAX WATCH *OUT*

If you had called me personally to ask, "What's happening lately with IRS audits of dealers and dealerships that I need to know about?" ... Here's what I'd say:

#1. 2009 ... THE YEAR IN REVIEW. In 2009, from an IRS activities standpoint, there was very little, if anything, that I would consider earth-shaking.

What really rocked the boat ... or sunk it ... for many dealers was the bankruptcies of General Motors and Chrysler and their aftermath. In the wake of these proceedings, many dealers found themselves to be without franchises, without inventories, or with some combination of the two.

Throughout the year, at various times and in various ways, dealers who lost or were losing their franchises had their hopes raised that there might be some way to avoid or reverse the heavy-handed treatment they had received from their "partners" at GM and Chrysler.

Unfortunately, in early December, these hopes were dashed with some sense of finality. Chrysler announced that it has unilaterally established a ***binding independent review process for rejected dealers***. Similarly, General Motors announced that it has established a ***binding arbitration process for wind-down dealers***.

Our good friend, Richard Sox at Myers & Fuller, P.A., is familiar to hundreds of CPAs who attend the annual AICPA Dealership Conferences where, for several years, he has presented updates on dealer-Factory relations (or lack thereof). With the permission of Mr. Sox, we have reprinted the Myers & Fuller "Alert" which it recently sent to its dealers concerning these new developments.

So, other than for these dealer-Factory issues, all-in-all, from the standpoint of tax developments, it was a fairly quiet year. ...Until September, that is.

Then the IRS dropped a surprise on us in a new "Directive" on cost capitalization. In it, the IRS urged dealers to consider changing their methods for applying the Section 263A cost capitalization rules to their inventories. In return for this consideration, the IRS said it would suspend audits raising cost capitalization issues until 2011. (Apparently the IRS needs time to regroup on this.)

On another front, there is a most critical problem for dealers if they are on LIFO ... it is simply how much of their LIFO reserves will they have to recapture as a result of lower inventory levels at year-end.

The ***Timelines*** in this section summarize this year's activities and developments. Basically, we have covered all of these either in the Mid-Year

see **DEALER TAX WATCH OUT**, page 2

WATCHING OUT FOR

Dealer Tax Watch *Out* 1
- A Modest Proposal to Fix the Cost Cap Mess .. 4
- The Year in Review ... 2009 Timeline 8
- Advisory to Chrysler & GM Dealers 12
- IRS *Automotive Alert* ... Cash for Clunkers .. 13

IRS Moratorium on Raising Sec. 263A Issues Urges Dealerships to File Forms 3115 ... What Should a Dealership Do? 14
- The Case Against "Jumping the Gun" at this Time 22
- IRS "Audit Tool Kit" for Fixing Sec. 263A Problems 25
- NADA's Year-End Relief Request 30

Year-End Planning for Dealers on LIFO 34

IRS Approves a "Tool Plan" in LTR 200930029 ... 38

Tax Update Seminar Outline (including "When Goodwill Goes Bad ... Writing Off the Loss") 40

LOOKING FOR ADDITIONAL & "VALUE ADDED" SERVICES FOR DEALER CLIENTS?

Look no further... Just use the *Dealer Tax Watch* for a head start in golden consulting opportunities and activities to help dealer clients—and, in the process, to help yourself.

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(Continued from page 1)

Edition and/or in this Edition of the *Dealer Tax Watch*. This year, again, we've included a few other developments in the timelines because they involve matters we track in the *Dealer Tax Watch*. Last year's 2008 Timeline is included for additional perspective and comparative purposes.

From the conversations I've had with many CPAs during the year, as far as ***IRS audit activity*** is concerned, my conclusion is the same as it was last year ... "There isn't much IRS audit activity going on currently. The few dealership audits of which I'm aware have been pretty much routine and Section 263A was not even prominently involved. IRS budget restrictions and personnel cutbacks seem to be involved with this lesser degree of audit activity."

I would add that, as far as the impact on budget restrictions and personnel limitations are concerned, one can only expect that, next year and in the reasonably foreseeable future, the lack of manpower and resources situations may become even more critical for the IRS than they already are.

In summary, many dealers are facing two immediate tax problems. If they are on LIFO, the first problem involves their LIFO reserve recapture issues. If they have lost a franchise (or are facing the loss of a franchise), the second problem relates to how they can write-off any unamortized goodwill that is still on the books in connection with the acquisition of the lost franchise(s). At the present time, for reasons discussed further in this Edition, I have concluded that the recent IRS activity concerning Section 263A shouldn't really require any immediate action ... So, you can relax and enjoy the holidays, at least temporarily.

#2. SECTION 263A ... THE IRS MUDDIES THE WATERS ... EVEN MORE ... IF THAT'S POSSIBLE. Last year, in commenting on the lack of guidance from the IRS on Section 263A issues, I wrote that as of Dec. 31, 2008, "The only action the IRS seems to be able to bring to bear on this subject is to keep moving it further down or around on its 'to do lists' - all with special names, of course - that hint at some future official pronouncements."

That "non-guidance" was pretty much status quo throughout the year ... until September 15, 2009.

Then, in a Directive to examining agents, the IRS said that it will suspend examination of auto dealership Section 263A issues effective September 15, 2009 and continuing through December 31, 2010.

The IRS said that it was doing this "in order to encourage compliance and to allow taxpayers in the auto dealership industry an opportunity to voluntarily change their methods of accounting to apply with the legal reasoning allowed in TAM 200736026."

During this moratorium period, examiners will not raise Sec. 263A issues.

Just what is this Directive supposed to mean? It seemed obvious to me, and to a few others who listened to the IRS Motor Vehicle Technical Advisor discuss this development in a webinar presentation sponsored by NADA on November 18, that ... "It's a jungle out there, with confusion everywhere."

In the September 2007 issue of the *Dealer Tax Watch*, I devoted about 30 pages to analyzing TAM 200736026. For a variety of reasons, I believe there are numerous shortcoming and deficiencies in the TAM. Recall that, in the TAM, the National Office (in several places) directed the IRS agent to essentially "go back and get more information" because of the deficiencies in the factual content that was presented to the National Office for ruling purposes.

So, this incomplete document is supposed to become the template for dealerships filing Forms 3115 to change their cost capitalization methods???

Here's what I think ... We've been down this road with the IRS before. The IRS is expecting that dealers ... and/or their CPAs and advisors ... will be able to understand and apply the ultra complicated technical interpretations that have been patched together in the Regulations over the years. These rules defy comprehension by the average, if not technically superior, practitioner, and they simply will not properly or realistically fit into most, if not all, dealership situations.

Notice that I did not say that the Regulations might not be "technically correct." ... I said that they are neither "proper" nor "realistic." The IRS is trying to drive square pegs into round holes, and we've seen how things turn out when they've done this before.

Let me give you two examples of what I mean when I say that "we've been down this road before." Do you remember all the hullabaloo about 10 years ago when the IRS took the extremely technical position that dealers could not value their parts and accessories inventories using replacement cost?

I'll cut to the chase here ... Despite overwhelming testimony from taxpayer expert witnesses (including yours truly) that it simply couldn't be done - that it was impossible to comply ... in *Mountain State Ford Truck Sales*, the Tax Court upheld the IRS (no surprise here) and said that dealers' parts and accessories inventories ***must*** be valued at "cost" for tax purposes because that's what the Code and Regulations require.

→

On this actual cost vs. replacement cost issue, countless technician angels tried to dance on the head of a pin. After the music stopped, do you remember what happened next? The IRS conceded the whole darn thing and, in Revenue Procedure 2002-17, said (not directly, nor using exactly these words), ... "I guess you dealers were right on this after all because nobody can do it ... so just go ahead and use replacement cost - instead of actual cost - anyway." ***Strike One.***

Here's another example going back a little further in time. Do you remember when the IRS insisted that, in order to satisfy the LIFO financial conformity requirements, dealerships on LIFO were required to include the result of changes in the LIFO reserve on year-end financial statements ... including statements sent to the manufacturers and their credit arms?

Well, here again, the IRS was correct, technically, in unraveling its own slanted Regulations. But, few, if any, dealers had been cautioned by their CPAs to do this. The end result was that the Service could have thrown many (thousands?) of dealers on LIFO off of LIFO ... with no relief at all.

Again, we had a situation where interpretation of enormously complex rules and rulings resulted in technical default in mass numbers by dealers. So, what happened here? The IRS issued a Revenue Procedure and a Revenue Ruling, the combined essence of which was that dealers who were in technical default had to pay a "ransom" penalty for running afoul of the rules. Some dealers paid upfront, usually on the recommendation of their CPAs. Other dealers took a "wait-and-see, let-them-come-and-get-us" approach.

I vividly remember sitting in the audience at an AICPA National Auto Dealership Conference in which the Motor Vehicle Technical Advisor (Ms. Mary Baker, at that time) regretfully and ruefully acknowledged that the IRS simply (1) collected the money from those dealers who willingly and unquestioningly paid up front and (2) never followed-up with those who did not. Not even with a postcard, a form letter or a telephone call.

I know a few CPAs who actually lost dealers as clients because they insisted/advised the dealerships to "take the high road" on this. Actually, it was the CPAs who took the road on this, without so much as even a "goodbye" from the dealers. These dealers just found a CPA who had fewer scruples - if they even knew about the issue - and didn't feel so "strongly" about jumping ahead and volunteering a big check to the IRS over some obscure, but technical, non-compliance. There was a lot of angst over this one, and in the end, the IRS never followed up on recalcitrant dealers. ***Strike Two.***

If you know me, or have read my work over the years, you know that on many occasions I have, with respect, disagreed with the IRS on technical matters. If you were to ask me, and many have, what my "advice" is on initiating a change in cost capitalization procedures at this time on the basis of the TAM, I would say, "Hold off until many of the underlying technical matters have been resolved."

Let me remind you again that this is merely ***my*** opinion "and it may not be used or cited as precedent" or substantial authority.

On December 1, NADA sent a letter to the Commissioner of the IRS and other high-ranking officials in which it requested broad relief for dealers on cost capitalization matters. This letter contains an excellent summary of the unsettled state of affairs. With NADA's permission, this letter is reprinted beginning on page 30, and NADA's disclaimer - concerning IRS Circular 230 that it does not provide legal or tax advice - should be respected.

With no disrespect to NADA or to the IRS, I believe that NADA mailed the letter to the wrong addressee ... to the wrong party. It's like talking to the monkey when you should be talking to the organ grinder.

The IRS isn't the culprit here ... ***Congress is to blame for this mess.*** When Section 263A was enacted in 1986, Congress wanted one set of broad rules to fit any and every situation possible. This was clearly impossible to achieve. IRS technicians and officials shouldn't be held accountable for trying to carry out an impossible task.

Congress wanted a set of broad rules ... and it got them ... and they are beyond any reasonable practitioner's comprehension and far beyond all limits of common sense. To fix the problem either the Code has to be changed or the Regulations substantially modified.

By now, you're probably thinking, "... OK, Mr. De Filipps, it's easy for you to write about what's wrong. What would you suggest to fix this mess?" Well, if I were King of the Cost Cap Kingdom, all 263 Acres of it, I'd issue the proclamation you'll find on page 4.

see **DEALER TAX WATCH OUT**, page 5

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If I Were King...

RESOLVING THE IRS - DEALERSHIP IMPASSE ON COST CAP

Would anyone disagree that we are clearly at the point of an impasse between the IRS on one side and NADA and auto dealerships (and their CPAs) on the other, over the application of Section 263A to automobile dealerships?

If it were left to me to remove the impasse, I'd do it by requiring the use of two simple amounts ... 2½% and $2,500.

1. Require all dealerships to capitalize 2½% of their ending inventory costs as their deemed Section 263A adjustment.
2. This would apply across the board, regardless of whether or not the dealership used the Last-In, First-Out, (LIFO) to value all or any part of its inventories.
3. Any amount capitalized at the beginning of the year would be offset against the amount capitalized at the end of the year. In other words, the net amount capitalized on a going-forward basis would increase only to the extent that year-end inventories increased over a period of years.
4. If the dealership were in existence in 1986, it would pay an additional 2½% of its Jan. 1, 1986 inventory value as the equivalent of the opening inventory adjustment that would have been required when Section 263A was enacted.
5. There would be an expedited procedure (comparable to the filing of Form 3115 or Form 970) by which the dealership would notify the IRS of the computation of the amount paid and the change in its Section 263A method. This form would not exceed 1 page, and it would be included in the tax return for the year of change when it is filed. A copy would be sent to the IRS National Office in Washington, DC.
6. The dealership would pay a flat fee of $2,500 to the IRS for processing the above form.

Frankly, the 2½% and $2,500 amounts could be slightly larger or slightly smaller. I'd listen to reasonable arguments in favor of either higher or lower amounts, but these amounts should be set so that neither dealerships nor the IRS were completely satisfied with them. I believe that the rate eventually arrived at should be (1) high enough so that NADA and its constituents are not happy with it because they think it's too high and (2) low enough so that the IRS is unhappy with it because the Service thinks it's too low. After all, isn't that the essence of a fair compromise?

On the other hand, I can think of a better way to come up with a percentage, but that would take 5 minutes of work ...

- ***Use the average of costs capitalized under Section 263A by all of the publicly-held dealership groups reporting to the SEC.***
    - For example, if the overall Section 263A rate used by AutoNation for its dealerships is 3½%, and the rate used by Sonic Automotive is 4½%, and the rate used by Lithia Motors is 2½%, and the rate used by United Auto Group is 3½%, and the rate used by Group I Automotive is 2½%, and the rate used by Asbury Automotive Group is 1½% ... the total of 18% divided by 6 equals 3%.

      In this case, the "uniform" Section 263A rate would be 3%. (If you're checking my math, you're missing my point. The idea is to come up with something simple and quick.)

      If the average is not a nice, round number as in the example above, you can round the rate up the nearest ½% in the even years, and you can round it down to the nearest ½% in the odd years.

      If you want to push the math aspect of this approach, you could take the average of the beginning- and the end-of-the-year rates for each group, then add the averages and then divided by the number of groups.
- ***Rationale.*** Each publicly-held dealership group (1) consists of a fairly large number of dealerships, (2) probably has either an internal tax department or a large accounting firm developing the amounts they are capitalizing for their dealerships under Section 263A and (3) probably is subject to more rigorous audit by the IRS, so their cost capitalization rates and methods are more likely to be subject to closely scrutiny.

  What's wrong with using their results as the basis for coming up with an overall, weighted rate that can be applied to the non-publicly-held dealership portion of the industry?

Historical note. I'm no stranger to trying to solve thorny problems. In July 1992, after attending a meeting with the National Tax Office in Washington attended by only a few CPAs, I submitted a proposal to the IRS for a simplified Alternative LIFO Method for New Vehicles.

At that time, there had been almost two decades of significant controversy over how LIFO could or should be applied to dealership new vehicle inventories. My proposal letter to the IRS on this matter is reproduced in the September 1992 issue of the *LIFO Lookout*, pages 16-18 ... I'll leave it to you to compare my proposal with the Revenue Procedure (92-79) that the IRS eventually issued.

In concluding my proposal letter to the IRS at that time, here's what I said about splitting the difference with a compromise approach. "These *compromise* modifications are the type I probably would recommend that a dealer accept (on audit) even though I might not like the sacrifices in overall accuracy. In this *compromise* version, I see dealers and the IRS *giving up* something more in the overall approach to get closer to a more practical, less judgment-intensive, alternative." I believe that my comments then would also apply to the current state of affairs.

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(Continued from page 3)

#3. WHAT'S GOING TO HAPPEN TO DEALERS' LIFO RESERVES AT THE END OF THIS YEAR?

With all that's happened during 2009 ... the fall-out from the bankruptcy of General Motors and Chrysler and the severe impact that the Cash for Clunkers program had on depleting dealers' inventories ... most dealers are looking at the prospect of significantly lower new vehicle inventories at year-end.

Some dealers fortunate enough not to have received a franchise termination letter are anticipating year-end inventory levels that are 30-40-50%, or more, lower than last year. For a dealer who is able to buy more inventory before year-end, there may be barriers to doing so because of floorplan / credit limitations and the other additional costs of carrying that inventory.

In other cases, there simply isn't any inventory out there for a dealer to "get." The manufacturers don't have it, or they have it, but won't allocate it.

Bottom line ... Many dealers who are running low on inventory face stiff recapture of their LIFO reserve if they cannot "get" inventory by the end of the year.

These dealers face the double whammy of (1) reduced sales and profits while fixed costs continue and (2) the potential of paying income tax on "paper profits" as their LIFO reserves turn around. It's a problem that has been brought about by adverse economic conditions far beyond any dealer's ability to control.

For these dealers, there's a little good news. We are expecting some inflation to be present in inventories at year-end, and this will help to increase an automobile dealer's LIFO reserve.

Unfortunately, there's a lot more bad news. In many instances, the positive result from inflation will be more than offset by the recapture of LIFO reserves due to the anticipated significantly lower year-end inventory levels.

If these matters concern you and your dealers, then I hope you are subscribers to the *LIFO Lookout*. I've included the longest article ever written (by me, at least) in the 2009 Year-End Edition of the *Lookout* addressing these questions and how CPAs can best advise their dealer clients in a variety of different circumstances with a variety of different strategies.

To give you an idea of what I regard as the most important considerations in dealing with these LIFO recapture problems, I've reprinted the table of contents for this article and some summary information from the *LIFO Lookout* on pages 34-37.

#4. WRITING-OFF GOODWILL FOR LOST OR TERMINATED FRANCHISES.

In acquiring franchises, many dealers have paid far more than dollar-for-dollar for tangible assets. As a result, they have capitalized on their books amounts referred to as "goodwill" that are associated with the acquisition of the particular franchise.

If the franchise, or certain other intangible rights, were acquired before August 10, 1993, they may have been amortized over a fairly short number of years. However, if the franchise were acquired after that date, Code Section 197 prescribes specific rules for amortizing the cost of those intangibles - including goodwill and covenants not to compete - over 15 years. This Section also includes rules for determining whether or not the unamortized cost associated with the franchise is permitted to be written off for tax purposes if the franchise is lost.

During 2009, as well as in 2010, if a franchise is lost or terminated by the manufacturer, it may be appropriate for the dealer to take an income tax deduction for the unamortized amount of goodwill on the books.

In considering the timing of the write-off for goodwill, you'll also have to consider the recent developments (mentioned in Update #1). The timing or the year of deduction for some of these write-offs may have been altered because of the December 2009 announcements by (1) Chrysler that it has unilaterally established a binding independent review process for rejected dealers and (2) General Motors that it has established a binding arbitration process for wind-down dealers.

Some dealers may have to postpone their write-offs until the negotiation process they will be going through has been finalized. Possibly, some dealers will be fortunate enough not to have any write-off because, upon review, they will be entitled to retain their franchise after all.

#5. MORE ACCOUNTING METHOD CHANGES BECOME AUTOMATIC & SOME CLARIFICATIONS WILL AFFECT COST CAPS.

On August 27, 2009, the IRS issued Revenue Procedure 2009-39 in which it updated its list of accounting method changes that do not require advance approval from the IRS. This list of automatic changes is included as the Appendix to Revenue Procedure 2008-52, and it was discussed, in some depth, on pages 14 through 44 in the 2008 Year-End Edition of the *Dealer Tax Watch*.

Two changes made by Revenue Procedure 2009-39 involve the definition of the same term: ***"a UNICAP method specifically described in the Regulations."*** These changes were made to Section 11.01 of the

see **DEALER TAX WATCH OUT**, page 6

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(Continued from page 5)

Appendix (to Rev. Proc. 2008-52) which relates to methods used by "*resellers* and reseller-producers" and to Section 11.02 which relates to methods used by "*producers* and reseller-producers."

In both instances, the term "UNICAP method specifically described in the Regulations" includes several of the *de minimis* rules (90% - 10% and 1/3-2/3 rules) applicable to many dealership situations. However, in both cases, a "UNICAP method specifically described in the Regulations" does ***not*** include ***"any other reasonable allocation method within the meaning of Reg. Sec. 1.263A-1(f)(4)."***

This, of course, is likely to marginalize efforts made by auto dealerships to justify their ***self-developed*** cost capitalization methods as "reasonable allocation methods within the meaning of Reg. Sec. 1.263A-1(f)(4).

All of this closely ties-in with the discussions in the article beginning on page 14 concerning the recent Directors Directive on cost capitalization issued in September.

#6. EMPLOYEE TOOL & EQUIPMENT PLANS. In July 2008, the IRS issued a Coordinated Issue Paper (CIP) that was extremely critical ... to the point of completely banishing ... employee tool and equipment plans. This CIP was discussed in the 2008 Mid-Year Edition of the *Dealer Tax Watch* (pages 48-62).

Interestingly, a year later, in July 2009, the IRS released LTR 200930029 in which it reviewed the expense reimbursement arrangement of a taxpayer (not a dealership), and it held that the arrangement satisfied all of the requirements of Section 62(c).

The IRS held that all payments made in accordance with the terms of the plan would be excluded from the employee's income, and they would not be considered as "wages" subject to the withholding and payment of employment taxes.

The IRS indicated that Revenue Ruling 2005-52, in which it was critical of ***tool allowance*** arrangements, was not relevant to its analysis of this taxpayer's ***expense reimbursement*** arrangement.

The plan approved by the IRS is essentially a dollar-for-dollar reimbursement arrangement. See page 38 for more details.

#7. TAX REFUNDS MAY BE LARGER UNDER YEAR-END CHANGE IN TAX LAW. Earlier this year, the enactment of the *American Recovery & Reinvestment Tax Act of 2009 (ARRA)* included a provision to allow certain businesses to carryback net operating losses for up to 5 years.

Under the provisions of *ARRA*, if the taxpayer was an "eligible small business," it could elect to carry back any net operating losses occurring in tax years beginning or ending in 2008 for three, four or five years (instead of only two years). However, this provision applied only to businesses with average gross receipts of less than $15 million. Therefore, almost all automobile dealerships were excluded from this provision because they were not eligible small businesses ... They were "too big to be small."

Just recently, however, with the enactment of the *Worker, Homeownership and Business Assistance Act of 2009 (WHBA)*, ***all businesses*** will be allowed to carryback losses incurred in 2008 or in 2009 for up to 5 years preceding the year of the net operating loss.

There is one limitation: any loss carried back under *WHBA* to the 5th preceding year cannot offset more than 50% of the income in that 5th preceding year. However, the excess of the amount of loss over 50% of the taxable income for the carryback taxable year can be carried to the other later taxable years. There are corresponding limitations with respect to the carryback of alternative tax net operating losses.

All of the details for making these elections, timely filing requirements and forms required to be filed, are contained in Revenue Procedure 2009-52.

Use LIFO planning to maximize your tax refunds. By maximizing the reduction of LIFO reserve recapture caused by lower inventory levels or by expanding the LIFO election to used vehicles, a dealership may create or increase a net operating loss in the current year for itself or for its shareholder/partners if it is operating as a pass-through entity.

Possible deferral of income from certain sales. General Motors - the new one - recently announced that it will extend its 60-day "customer satisfaction guaranteed" program that was supposed to end November 30, 2009. The program will now continue to run for vehicles sold through January 4, 2010.

This is part of the new GM's "May the Best Car Win" aggressive advertising campaign. Dealers, no doubt, will be happy to sell as many GM vehicles as they can. These sales will help a dealer's bottom line, but at the same time, they will aggravate their year-end lower LIFO inventory problems.

If we're led to believe that the customer unilaterally can decide to return the vehicle ... "No questions asked, etc., etc." ... (and, you'll have to check the fine print on this ...), is the vehicle sold under the "May the Best Car Win" program really considered to be ***"sold"*** as of year-end for accounting and/or tax purposes? Have "all events" really occurred to make that sale

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final as of Dec. 31, 2009? Or, is it a "contingent sale" of sorts?

Should profit on the sale of vehicles sold in 2009 but for which the "no questions asked" return date has not been reached by December 31, 2009 be counted as income in 2009?

Obviously, if the vehicle hasn't been "sold" as of Dec. 31, 2009, shouldn't that profit be deferred and the vehicle included in the dealer's ending inventory (for LIFO purposes)?

#8. DE FILIPPS' YEAR-END DEALER TAX UPDATE SEMINARS. Since mid-year, I've made several year-end update presentations to different dealer-CPA groups and presented a 2-hour audio telephone seminar for CCH, Wolters-Kluwer.

Several of the topics in my year-end presentation are discussed more fully in this issue of the *DTW.*

#9. YEAR-END PLANNING ... CONSIDER TAKING ADVANTAGE OF LOWER TAX RATES ON QUALIFIED INCOME NEXT YEAR. As we approach year-end 2009, about all we know for sure is that the favorable lower tax rates on dividend income and net long-term capital gains are still in effect for 2009. They are scheduled to remain in effect at least through the end of 2010. Although that could change, it should be kept in mind that sooner or later the income tax rate on dividend income will increase from 15% to nearly 40%. This is the full hit on taxing dividends paid by corporations to individual shareholders as ordinary income.

Also, many expect that the rates on long-term capital gains will increase by at least one-third from 15% to 20%.

If you haven't explored the possibility of taking advantage of this situation with your corporate clients, there is still time ...but, time may be running out.

#10. "RED FLAGS" HANG LIMP ... YET ANOTHER DELAY OF ENFORCEMENT. At the request of Congress, the Federal Trade Commission announced on October 30, 2009 that it is again delaying enforcement of the "Red Flags" Rule until June 1, 2010 for financial institutions and creditors subject to enforcement by the FTC.

Dealerships, of course, are required to comply with these provisions and rules.

The identity theft Regulations and guidelines require financial institutions and creditors to develop and implement written "identity theft prevention programs."

Essentially, a "Red Flags" program must do four things ... (1) Identify *red flags* which are patterns, practices or specific activities that indicate the possible existence of identity theft. (2) Detect red flags that exist in the dealership's environment. (3) Respond appropriately to any red flags that are detected. (4) Be periodically changed and updated to reflect changes in risks from identity theft.

The final rules became effective on January 1, 2008, but full compliance with them has been delayed several times, so this last, recent delay in enforcement was not totally unexpected.

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DTW 2009 Timeline	***JAN. 1, TO DEC. 31, 2009 ... THE YEAR IN REVIEW*** **Page 1 of 3**
January	• IRS Motor Vehicle Technical Advisor issues three *Automotive Alerts*, all dated January 2009... ◆ ***Dealership Loaner Vehicle Fleets and Depreciation*** ◆ ***Tax Court Rules on Inventory Writedowns in West Covina Motors, Inc.*** ◆ ***Cash Reporting on Your Dealership*** *... Updated Questions & Answers on Form 8300*
Jan. 24-27	• At NADA Convention in New Orleans, LA, Ms. Terri Harris (IRS Motor Vehicle Technical Advisor - MVTA) presents a workshop on dealership Federal income tax issues. ◆ Ms. Harris discusses several technical issues, answers numerous questions for attendees. ◆ Ms. Harris expresses (major) concern that some dealerships may be taking "aggressive positions" in tax returns that will be filed for 2008 and 2009.
February 17	• ***American Recovery & Reinvestment Act of 2009 (ARRA)*** enacted. Includes significant provisions to reduce taxable income and expand ability of businesses to carryback net operating losses. Two major provisions affecting (some) dealerships... ◆ Net operating losses occurring in tax years beginning or ending in 2008 can be carried back for three, four or five years (instead of only two years) by election of the taxpayer. ▪ However, this applies only to businesses with average gross receipts of less than $15 million. ▪ Unfortunately, this beneficial provision excludes many, many dealerships, since they are "too big to be small," and are thus, ineligible. ◆ Section 179 expense/depreciation limits expanded and extended through 2009. ▪ Increase in Sec. 179 expense amount to $250,000 limit. ▪ Increase in phase-out threshold to $800,000.
March 10	• ***Reasonable compensation.*** U.S. Court of Appeals for the 7th Circuit reverses the Tax Court's decision in *Menard, Inc.* ◆ This reversal by the Appeals Court holds that the Tax Court committed clear error in ruling that John Menard's compensation was excessive in 1998. ◆ Although times right now are bad for many dealerships and the issue of "reasonable compensation" seems a dream of yesteryear, when things get better and dealerships are profitable (and there is no 15% preferential tax rate of dividends muddying the analysis of whether to pay salary or a dividend to a working shareholder), the language in this case should draw you like a magnet in defending dealer compensation as reasonable.
April 13	• ***Section 263A inventory cost capitalization rules.*** In Notice 2009-25, IRS invites public comments on how certain business practices in the retail industry have changed since Section 263A came into the Code. ◆ How have changed retail business practices, including those resulting from technological advances and current trends, affected the application and administration of the existing Regulations under Section 263A to retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility? ◆ How, if at all, should the definitions of *on-site sales*, a *retail customer*, a *retail sales facility*, a *dual-function storage facility*, etc., be modified to reflect current business practices of retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility?
April 30	• ***Chrysler bankruptcy.*** Chrysler files for protection under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York. ◆ On May 14 ... 789 Chrysler dealers received letters telling them their franchises will be terminated. ◆ This impacts Chrysler, Jeep, Dodge and Dodge Truck dealers ◆ Initial filings indicate that Chrysler's bankruptcy proceedings are going to take the form of a sale of Chrysler's major assets under Section 363 of the Bankruptcy Code and a liquidation of a remainder of the Company. • See NADA web site (www.nada.org) for comprehensive information and a detailed timeline.
May 11	• ***Proposal to repeal use of Last-In, First-Out (LIFO) method.*** The *President's Budget Green Book*, released May 11, 2009, includes, as a proposal for revenue increases, ◆ Full repeal of the LIFO method for all businesses, regardless of industry or size. ◆ Repeal would be effective in 2012. ◆ Spread period for repaying LIFO reserves would be over 8 years (presumably taking 1/8 of the amount of the LIFO reserve into income starting in year 2012 and 1/8 of the amount of the LIFO reserve in each of the 7 years thereafter).

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DTW 2009 Timeline	*JAN. 1, TO DEC. 31, 2009 ... THE YEAR IN REVIEW* Page 2 of 3
May	• IRS publishes *Audit Technique Guide* for the Retail Industry. ◆ This includes significant discussions regarding audit considerations for used vehicle dealers and buy-here, pay-here operations.
June 1	• ***General Motors bankruptcy.*** General Motors files for protection under Chapter 11 of the U.S. Bankruptcy Code in U.S. Bankruptcy Court in Manhattan (New York). • GM notifies 1,124 dealers that their franchises will not be renewed when they expire in October 2010. ◆ GM intends to eliminate all Pontiac, Saab, Saturn and Hummer dealers. ◆ In addition, GM intends to eliminate more than 1,000 Chevrolet, Cadillac, Buick and GMC dealers. These dealers have received what are called "Wind-Down Agreements." • Those Chevrolet, Cadillac, Buick and GMC dealers that General Motors has determined it will allow to continue in operation will receive what are labeled "Participation Agreements." • See NADA web site (www.nada.org) for comprehensive information and a detailed timeline.
June 24	• President Obama signs *Consumer Assistance to Recycle and Save Act of 2009* (*CARS Act*).
June 26	• ***Sec. 263A cost capitalization.*** NADA submits comments to IRS in response to IRS Notice 2009-25. This Notice requested public comments on... ◆ How business practices in the retail industry have changed since the publication of the Uniform Capitalization Regulations. ◆ Whether some definitions under the Regulations should be modified in light of current practices. These comments may help the IRS update the existing definitions in the Regulations of such terms as (1) on-site storage facility, (2) retail sales facility, (3) on-site sales and (4) dual-function storage facility.
June 30	• IRS Business Plan Year ends ... with no action by the IRS on Section 263A cost cap guidance, either in the form of a Revenue Ruling or Revenue Procedure to adopt the IRS positions expressed in TAM 200736026.
July 23	• National Highway Traffic Safety Administration issues rules for the *Car Allowance Rebate System* (*CARS* Program), a voluntary vehicle trade-in and purchase program.
July 24	• ***Employee tool & equipment plans.*** Letter Ruling 200930029 holds that an employer's expense reimbursement arrangement satisfies the accountable plan requirements of Sec 62(c). ◆ The employer in this Ruling is not an automobile dealership. ◆ The plan involved is basically a dollar-for-dollar reimbursement arrangement.
July	• ***Cash for Clunkers.*** IRS Motor Vehicle Technical Advisor issues *Automotive Alert*, dated July 2009. This *Alert* discusses taxability of payments to dealerships.
August 17	• ***LIFO terminations ... IRS guidance on spread period for dealership recapture of LIFO reserve when election is terminated due to loss of franchise.*** IRS issues guidance on Section 481(a) adjustments and spread periods when dealers who lose their franchises terminate their LIFO elections. • In ILM 200935024 (dated August 17, 2009), the agent was questioning whether the usual 4-year spread period for the Section 481(a) adjustment resulting from the termination of the LIFO election should be accelerated because the dealership no longer had new vehicle inventory specific to the franchise that was terminated. Three situations were addressed. ◆ In the first two fact situations in the ILM, the dealership involved was not using the Alternative LIFO Method for new vehicles. Instead, this dealership was using a separate LIFO pool for the new vehicles for each ***franchise*** ... the dealership had 5 different franchises, and it had 5 separate LIFO pools. ◆ The third fact situation seems to provide a "blueprint" that might be beneficial to certain dealerships that have lost their franchises. The IRS guidance in this case may help them to stay on LIFO for some of their new vehicle inventories, while losing only the benefit of the LIFO reserve attributable to the lost franchise.

DTW 2009 Timeline	***JAN. 1, TO DEC. 31, 2009 ... THE YEAR IN REVIEW*** Page 3 of 3
August 27	• ***More accounting method changes become automatic.*** Revenue Procedure 2009-39 updates the official list of automatic accounting method changes in the Appendix to Rev. Proc. 2008-52. • It also includes a few Sec. 263A definition clarifications.
September 15	• ***IRS declares moratorium on raising Section 263A issues in dealership audits.*** In a Directive from the Industry Director (Heavy Manufacturer and Transportation), the IRS announced that it will suspend examination of auto dealership Section 263A issues effective September 15, 2009 and continuing through December 31, 2010. ◆ This IDD (Industry Director Directive) states that the IRS is declaring this moratorium "in order to encourage compliance and to allow taxpayers in the auto dealership industry an opportunity to voluntarily change their methods of accounting to apply with the legal reasoning allowed in TAM 200736026." ◆ During this moratorium period, examiners are instructed not to raise Sec. 263A issues. ◆ Directive includes an *Audit Tool Kit* for examiners to use when moratorium ends on January 1, 2011.
October 22-23	• ***AICPA National Auto Dealership Conference.*** At this Conference in New Orleans, a broad range of subjects and speakers attracted individuals from dealerships and CPAs with auto dealership practices. ◆ Presentations this year did not include an update on IRS tax developments by Ms. Terri Harris, the IRS Motor Vehicle Technical Advisor (MVTA).
October 30	• ***Red Flag Suspension.*** The Federal Trade Commission announced a further suspension of enforcement of the "Red Flags" Rule requiring creditors and financial institutions to have identity theft prevention programs in place. ◆ This delay in enforcement will end on June 1, 2010.
November 6	• ***Net operating loss carryback relief expanded to include all dealerships.*** All businesses, including dealerships, may carryback losses incurred in 2008 or in 2009 for up to 5 years preceding the year of the net operating loss. ◆ The *Worker, Homeownership and Business Assistance Act of 2009 (WHBA)* amended Code Section 172(b)(1) to allow this relief. ◆ Under the *ARRA* legislation (Feb. 17), most dealerships would not have qualified for relief. • ***Limitation:*** Any loss carried back under *WHBA* to the 5th preceding year cannot offset more than 50% of the income in that 5th preceding year. ◆ However, the excess of the amount of loss over 50% of the taxable income for the carryback taxable year can be carried to the other later taxable years. • Revenue Procedure 2009-52 provides all of the details for making these elections, timely filing requirements and forms required to be filed.
November 18	• In a 2-hour webinar presented by NADA, Ms. Terri Harris, the IRS MVTA, discusses the Sept. 15 IDD declaring a moratorium on the IRS raising cost capitalization issues.
December 1	• NADA submits request for relief from IRS oppressive interpretations of the application of the cost cap rules to auto dealerships.
December 31	• For changes intended to be effective for calendar year 2009, Dec. 31 is the deadline for filing Forms 3115 for any changes in accounting method(s) relating to Section 263A if the change in method cannot be made as an automatic change (i.e., if the change requires advance approval from the IRS).
Various	• De Filipps seminars ... *2009 Mid-Year and 2009 Year-End ... Dealer Tax Update Tax Strategies & IRS Activities* ... various dates & locations ... including a 2-hour CCH audio seminar.

DTW 2008 Timeline	JAN. 1, TO DEC. 31, 2008 ... THE YEAR IN REVIEW Page 1 of 1
January	• Several new *Automotive Alerts*, all dated January 2008, are issued by the office of the IRS Motor Vehicle Technical Advisor ... ◆ ***IRC Section 263A TAM 200736026 Addresses Dealership UNICAP Issues*** ◆ ***Electronic Records Retention Requirements*** *for Auto Dealerships ... Rev. Proc. 98-25* ◆ ***Alternative Motor Vehicle Credit*** *for Qualified Hybrid Vehicles & Alternative Fuel Vehicles*
January 30	• General Alert issued on IRS Cross-Divisional Team re: ***Employee Tool & Equipment Plans***
Feb. 8 - 12	• At NADA Convention in San Francisco, CA, Ms. Terri Harris (IRS Motor Vehicle Technical Advisor - MVTA) presents a workshop on dealership Federal income tax issues.
Feb. 25	• Cost Segregation (depreciable asset lives) for dealerships is addressed comprehensively in a new chapter added to IRS *Audit Technique Guide.*
March 4	• U.S. Court of Appeals for the 6th Circuit affirmed Tax Court decision in *Huffman, et al.*, allowing IRS to change accountant's errors in LIFO calculations by making a Section 481(a) adjustment to the dealership's earliest open year.
March 8	• ***Revenue Procedure 2008-23.*** IRS permits dealerships to use a single, combined LIFO pool for all new vehicles ... and/or for all used vehicles (Rev. Proc. 2008-23). ◆ Alternatively, IRS clarifies how new and/or used crossover vehicles should be treated by dealerships if they do not elect to use the single, combined LIFO pool method.
March 26	• Sec. 263A ... NADA submission to the IRS requests that non-producer dealership cost capitalization issues be considered for guidance under the IIR Program.
April 2	• In *Irwin Muskat v. U.S.A.*, IRS prevails in District Court, and taxpayers who sold their business are not able to prove that $1 million of the proceeds received under a non-compete agreement were really allocable to goodwill that they sold in connection with their business.
April 16	• In *Solomon v. Comm.*, IRS prevails in Tax Court, and the individual sellers of a portion of their business are not successful in claiming that a portion of the proceeds received were received for the sale of customer lists (which should have been taxed as long-term capital gain). Instead, amounts received were attributable to the sellers' covenants not to compete.
April 24	• De Filipps seminar ... *How Auto Dealership LIFO Inventories Can Benefit by Using the New Single Pool Method* (a 2-hour CCH audio seminar)
May 7	• IRS Chief Counsel's Office issues Memo No. 200825044 ... Guidance on Combining Pools Under Rev. Proc. 2008-23 Vehicle-Pool Method ... potential problems with IRS approach
May 8	• NADA seminar ... *Recent Tax Issues Affecting Auto Dealers* presented by Mr. Paul Metrey (NADA) and Ms. Terri Harris (IRS Motor Vehicle Technical Advisor) (a 2-hour web seminar)
Various	• De Filipps seminar ... *Mid-Year 2008 Dealer Tax Update Tax Strategies & IRS Activities ...* various dates & locations
July 2	• ***Employee tool & equipment plans*** ... IRS issues Coordinated Issue Paper for the Motor Vehicle Industry (based upon Chief Counsel Advice issued in late 2007) ... LMSB-04-0608-037
August	• ***Revenue Procedure 2008-52.*** IRS revises and updates procedures for taxpayers to secure designated automatic changes in accounting methods (Rev. Proc. 2008-52). The Revenue Procedure includes an updated list of all changes eligible for "automatic change" treatment. Effective for Forms 3115 (*Change in Accounting Method*) filed after August 18, 2008.
October 22	• ***Red Flag Suspension.*** The Federal Trade Commission announced a 6-month suspension of enforcement of the "Red Flags" rule requiring creditors and financial institutions to have identity theft prevention programs in place. This delay in enforcement (which otherwise would have begun on November 1, 2008) will end on May 1, 2009.
October 23-24	• ***AICPA Dealership Conference.*** At the Annual AICPA National Auto Dealership Conference in Las Vegas (at Caesars Palace), a broad range of subjects and speakers attracted individuals from dealerships and CPAs with auto dealership practices. Presentations included an update on IRS tax developments by Ms. Terri Harris (the IRS Motor Vehicle Technical Advisor) and on several other tax subjects.
October 28	• ***S Corp Shareholder Loss Deduction Limitations.*** Final regulations were issued to limit the amount of basis attributable to open account indebtedness that a shareholder in an S Corporation can use to absorb losses from that S corp. in his or her individual income tax return. (Reg. Sec. 1.1367-2)
Various	• De Filipps seminar ... *Year-End 2008 Dealer Tax Update Tax Strategies & IRS Activities ...* various dates & locations

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Respond to: Tallahassee Office

December 4, 2009

GENERAL MOTORS WIND-DOWN DEALER ALERT

As you have likely heard, *GM has unilaterally established a binding arbitration process for wind-down dealers*, with the understanding that this binding arbitration is an alternative to federal legislation affecting GM's dealer network.

The fundamental elements of the appeal process include the following:

- Provide each wind-down dealer the criteria used by New GM in making its decision to discontinue dealers;
- Offer of a face-to-face meeting with manufacturer representatives to discuss the criteria, and allow the dealer to present information to refute the discontinuance decision; and
- Right to participate in binding arbitration if dealer believes its discontinuance was not warranted.

It is expected that GM will send a letter to each discontinued dealer providing details of the process.

A dealer entering into this process with GM should be extremely cautious. A binding agreement as to the outcome of this process could restrict a dealer from taking advantage of the opportunity to (i) benefit from future federal legislation addressing reinstatement of dealers; (ii) benefit from current and future state legislation addressing reinstatement of dealers; and (iii) to challenge the dealer's rejection under state franchise or other laws.

Before agreeing to GM's appeal process, dealers should consult with an experienced motor vehicle franchise lawyer to insure that they understand the ramifications of such an agreement.

The foregoing information is provided for educational purposes only and is not to be construed or interpreted as legal advice.

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Respond to: Tallahassee Office

December 4, 2009

REJECTED CHRYSLER DEALER ALERT

As you have likely heard, *Chrysler has unilaterally established a binding independent review process for rejected dealers*, with the understanding that this binding independent review is an alternative to federal legislation affecting Chrysler's dealer network.

The fundamental elements of the appeal process include the following:

- Provide each discontinued dealer the general criteria and standards used by Old Chrysler in making its rejection decisions and the specific criteria considered and applied to the individual discontinued dealer's circumstances;
- Offer of a face-to-face meeting with manufacturer representatives to discuss the criteria, and allow the dealer to present information to refute the rejection decision; and
- Right to call for a binding independent review if dealer believes its rejection was not warranted.

It is expected that Chrysler will send a letter to each discontinued dealer providing details of the process.

A dealer entering into this process with Chrysler should be extremely cautious. A binding agreement as to the outcome of this process could restrict a dealer from taking advantage of the opportunity to (i) benefit from future federal legislation addressing reinstatement of dealers; (ii) benefit from current and future state legislation addressing reinstatement of dealers; and (iii) to challenge the dealer's rejection under state franchise or other laws.

Before agreeing to Chrysler's appeal process, dealers should consult with an experienced motor vehicle franchise lawyer to insure that they understand the ramifications of such an agreement.

The foregoing information is provided for educational purposes only and is not to be construed or interpreted as legal advice.

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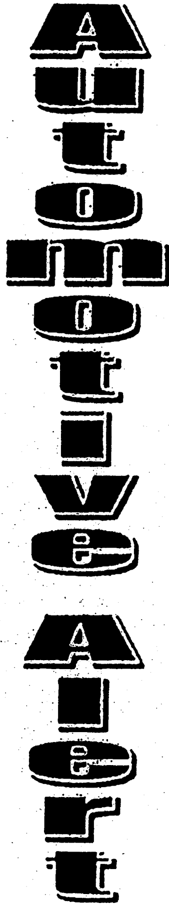
IRS

CONSUMER ASSISTANCE TO RECYCLE AND SAVE (CARS) ACT OF 2009

TAXABILITY OF PAYMENTS TO DEALERSHIPS



Introduction

On June 24, 2009, the President signed into law the Consumer Assistance to Recycle and Save Act of 2009 (the CARS Act). On July 23, 2009, the Acting Deputy Administrator of the National Highway Traffic Safety Administration (NHTSA) issued rules for the Car Allowance Rebate System (CARS Program).

The CARS Program is a voluntary vehicle trade-in and purchase program. The program helps consumers pay for a new, more fuel efficient car or truck from a participating dealer when they trade in a less fuel efficient car or truck. Consumers may receive credits of $3500-$4500 depending upon how the trade-in and acquired vehicles fit within the program criteria. Generally, the trade-in vehicle must have an EPA combined fuel economy below a specified value and the new vehicle must have an EPA combined fuel economy above a higher specified value.

The Rules provide a process for dealerships to register to participate in the CARS Program and establish criteria for consumers wishing to participate in the program. The program covers qualifying transactions that occur between July 1, 2009 and November 1, 2009, so long as allocated funds remain. If the dealership meets all of the program requirements, including transferring the trade-in vehicle to a disposal facility to be crushed or otherwise disposed of, NHTSA will electronically transfer the appropriate credit amount to the dealership. Dealers must apply the credit amount (in addition to any other rebate or discount) to the customer's price of the purchased or leased vehicle.

Discussion

The CARS Act specifically states that the credit is not income to the purchaser. The Act does not address the taxability of the credit amount to the dealership or the deductibility of any expenses incurred by the dealership in participating in the program.

Gross income generally means all income from whatever source derived unless specifically excluded by law. Additionally, gross income includes income realized in any form, whether in money, property, or services. Gross income derived from a business means the total sales, less the cost of goods sold. Internal Revenue Code § 61; Treas. Reg. § 1.61-3.

In a typical dealership transaction, a customer may pay for the vehicle in cash, finance the full vehicle price, or finance something less than the full selling price after the application of a cash down payment or a trade-in vehicle allowance. A dealership's gross receipts include the full selling price of the vehicle, regardless of the form of the customer's payment. In addition, to the extent the dealership receives any scrap value for the customer's trade-in, that scrap amount is includible in the dealership's income.

The credit and ultimate payment by NHTSA to the dealership under the CARS Program is includible in the dealership's gross receipts from the sale of the vehicle. The dealership must include this income in the year the vehicle is sold.

The dealership is allowed to offset gross income by the cost of goods sold. If the dealership incurs any ordinary and necessary expenses in disposing of the trade-in vehicle an additional deduction may be allowable.

Dealers should be careful to maintain proper records of the CARS transactions including the gross receipts from the sale of the new vehicle, the CARS payment amount, and any expenses incurred to dispose of the traded-in vehicle.

Motor Vehicle Technical Advisor

July 2009

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It should be noted that this document is not an official Service pronouncement and may not be cited as authority

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IRS MORATORIUM ON RAISING SEC. 263A ISSUES URGES DEALERS TO CHANGE THEIR ACCOUNTING METHODS ... WHAT SHOULD A DEALERSHIP DO?

BACKGROUND

This article surveys the major recent developments that culminated in the IRS Notice in September 2009 that it would suspend raising cost capitalization issues in the audit of dealerships through December 31, 2010.

During the long and contentious audit of one automobile dealership, the IRS questioned the manner in which the dealership had attempted to comply with the requirements of Section 263A in capitalizing certain costs relating to its inventory. As a result of this audit, in September 2007, the IRS National Office issued Technical Advice Memorandum (TAM) 200736026 in which it raised 10 major issues in taking exception to the dealership's ***"self-developed method"*** for capitalizing additional costs under Section 263A.

This TAM was analyzed in detail in the September 2007 issue of the *Dealer Tax Watch.*

The 10 major Section 263A issues raised in the TAM can be subdivided into three broad areas ... (1) production and handling activities, (2) retail sales facility issues and (3) identification and allocation of costs. A summary of the issues and holdings is included on pages 19-21.

A few months later, in March 2008, the National Automobile Dealers Association (NADA) requested the IRS to consider the non-producer dealership cost capitalization issues that were included in the TAM for guidance under the IRS' Industry Issue Resolution (IIR) Program. This letter, dated March 26, 2008, was reproduced in the 2008 Mid-Year Edition of the *Dealer Tax Watch* on pages 14-16. →

Timeline	*SECTION 263A ... RECENT DEVELOPMENTS ... 2007 - 2009*
Sept. 7, 2007	• TAM 200736026 raised 10 major issues in analyzing and taking exception to a dealership's ***"self-developed method"*** for capitalizing additional costs under Section 263A.
March 26, 2008	• NADA requests IRS to consider non-producer dealership cost capitalization issues for guidance under the IRS Industry Issue Resolution (IIR) Program.
August, 2008	• Revenue Procedure 2008-52 revises and updates procedures for taxpayers to secure designated automatic changes in accounting methods. The Appendix to this Rev. Proc. contains the official list of all changes in method that are eligible for "automatic change" treatment.
	2009
April 13	• IRS Notice 2009-25 requests comments on updating cost capitalization Regulations.
June 26	• NADA submits comments in response to IRS Notice 2009-25.
July 13	• IRS Retail Counsel responds to comments relating to property acquired for resale.
August 27	• Revenue Procedure 2009-39 adds some Section 263A changes to the list of "automatic" CAMs and clarifies certain other Sec. 263A definitions.
September 15	• IRS declares that it will suspend examination of automobile dealership Section 263A issues effective September 15, 2009 and continuing through December 31, 2010.
November 18	• IRS Motor Vehicle Technical Advisor presents *"The New IRS Field Directive on UNICAP ... What It Means for You"* ... a two-hour webinar presented for NADA Management Education.
December 1	• NADA submits request for relief from IRS oppressive interpretations of the application of the cost cap rules to auto dealerships.
December 31	• For changes intended to be effective for calendar year 2009, Dec. 31 is the deadline for filing Forms 3115 for any changes in accounting method(s) relating to Section 263A if the change in method cannot be made as an automatic change (i.e., if the change requires advance approval from the IRS).

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Eventually, the IRS declined to include these matters as part of its IIR Program.

In August 2008, the IRS issued Revenue Procedure 2008-52 in which it revised and updated procedures for taxpayers to secure designated automatic changes in accounting methods. This Revenue Procedure includes an Appendix which contains an updated list of all changes eligible for "automatic change" treatment. It is effective for Forms 3115 (*Change in Accounting Method*) filed after Aug. 18, 2008.

This impacts current considerations relating to the procedures that dealerships must follow in requesting permission to make changes in various methods of accounting, including Section 263A methods of accounting.

In addition, any dealership considering changing its method, or sub-methods, of accounting under Section 263A must consider the recent changes and clarifications made by Revenue Procedure 2009-39. These are discussed in Watch Out Item #5 on page 5.

IRS NOTICE 2009-25 REQUESTS COMMENTS ON UPDATING SEC. 263A REGULATIONS

On March 26, 2008, the IRS invited public comments on how certain business practices in the retail industry have changed since the promulgation of the uniform capitalization Regulations under Section 263A in the 1990s and whether certain definitions under the Regulations should be modified in light of current business practices.

Notice 2009-25 explained that the Service recognized that the retail industry has changed over the last fifteen years due to advancements in technology and service innovations. As a result of these changes, certain provisions in the cost capitalization Regulations may not take into account some of the present-day retail business practices, and the existing Regulations may have unintended consequences for some retailers.

For example, many retailers sell merchandise directly to retail customers in on-site sales and also sell merchandise from their sales facilities over the Internet and by fax. The existing definitions of on-site storage facility, retail sales facility, on-site sales and dual-function storage facility do not contemplate the current volume and types of Internet and fax sales that these retailers transact from their sales facilities.

Because Internet and fax sales generally are not made to retail customers physically present at the facility, these sales are generally not considered to be on-site sales under the current definitions. Consequently, these retailers must treat their facilities as dual-function storage facilities, and not as retail sales facilities and on-site storage facilities.

Similarly, some retailers enter into arrangements to lease their merchandise to customers and then sell the merchandise (i.e., vehicles, in the case of an automobile dealership) in conjunction with the underlying lease contracts to third-party finance companies.

These retailers are required to treat their facilities (that would otherwise be treated as retail sales facilities and on-site storage facilities) as dual-function storage facilities because the retailers sell some merchandise to third-party finance companies that are not retail customers. These retailers also may be required to capitalize a portion of their handling and storage costs based on the ratio of gross sales of the facility that are not on-site sales to total gross sales of the facility.

The IRS said it was interested in comments concerning two major issues.

First, how have changed retail business practices, including those resulting from technological advances and current trends, affected the application and administrability of the existing Regulations under Section 263A to retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility?

Second, how, if at all, should the definitions of (1) on-site sales, (2) a retail customer, (3) a retail sales facility, (4) a dual-function storage facility, and (5) other terms in Reg. Sec. 1.263A-3(c)(5)(ii) be modified to reflect current business practices of retailers that transact both on-site sales and sales that are not on-site sales from the same sales facility?

NADA SUBMITS COMMENTS IN RESPONSE TO IRS NOTICE 2009-25

In June 2009, NADA submitted a comprehensive document, responsive to many of the issues raised in TAM 200736026 and in response to the questions posed in Notice 2009-25.

These comments are outlined on page 24. Interestingly, in addition to NADA's response, there was only other submission.

IRS RETAIL COUNSEL RESPONDS TO COMMENTS RELATING TO PROPERTY ACQUIRED FOR RESALE

In July, the IRS Retail Counsel responded to some of the comments NADA raised. These IRS responses included the comments of the IRS *Retail Team* and of the *Section 263A Team*, with each team endorsing the other's comments.

In connection with property acquired for resale, particularly sales made by Internet and/or fax, Counsel picked up on the fact that NADA's comments

see **MORATORIUM**, page 16

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 (Continued from page 15)

expressly acknowledge that such sales are rare, and that most customers who use the Internet to do research concerning a purchase ultimately go to the dealership in person to finalize the sale.

Accordingly, it responded that any exception to the current capitalization rules for storage and handling costs currently contemplated should be narrowly targeted to address only an auto dealership's situation and should not be extended to retailers generally. Otherwise, disparate tax treatment among retailers, e-tailers and wholesalers would clearly result.

With respect to NADA's concerns about lessors of vehicles, when the actual sale is to a financing company which is not a retail customer, Retail Counsel suggested that the Regulations be changed to provide as follows ... *"Certain other non-retail customers treated as retail customers. With respect to this Section, in the case of an automobile dealership which is a retail sales facility, a lessor [lessee?] of a vehicle, which vehicle immediately prior to inception of the lease is physically located at the retail sales facility or in on-site storage, shall be treated as a retail customer."*

This change would be beneficial to dealerships with significant leasing transactions.

IRS DECLARES MORATORIUM

In a Industry Director's Directive (IDD) dated Sept. 15, 2009 from Industry Director (Heavy Manufacturer and Transportation), the Director announced that the Service will temporarily suspend the examination of automobile dealership Section 263A issues effective September 15, 2009 and continuing through December 31, 2010.

This Directive is addressed to agents examining automobile dealerships which include businesses that sell new or used passenger vehicles, light trucks and medium and heavy duty trucks.

The IRS has classified auto dealership Section 263A issues as a Tier III issue because of a high level of taxpayer non-compliance. Tier III issues include industry risks that represent the highest compliance risk for a particular industry. In addition, the IRS has formed a Tier III Issue Management Team and tasked it with responsibility for assessing the level of industry compliance and the development of audit tools to assist examiners in evaluating and examining the issues.

Attached to the IDD is an *audit tool kit* that was developed by the Issue Management Team. This tool kit includes (1) audit plan, (2) a glossary of terms and definitions and (3) computation spreadsheets and worksheets.

According to the Director, the legal reasoning included in TAM 200736026 "may" be instructive for auto dealership examinations, even though a TAM is not authoritative guidance. "The TAM is a comprehensive document addressing multiple issues and sub-issues and must be reviewed in its entirety to properly analyze all issues."

The Directive then summarized the conclusions in the TAM as follows. (1) When the dealership or a sub-contractor installs parts to new and used vehicles owned by the dealership, the activities ***"may"*** constitute production activities, (2) costs attributable to repair/installation activities with respect to customer-owned vehicles ***"may"*** constitute handling costs, (3) vehicles sold at wholesale, vehicles sold to another dealership at cost, leased vehicles and some parts sales ***"generally"*** are not on site sales to retail customers (thus, requiring computations under Sec. 263A for dual facilities).

The Directive said this moratorium is declared ***"in order to encourage compliance and to allow taxpayers in the auto dealership industry an opportunity to voluntarily change their methods of accounting to apply with the legal reasoning allowed in TAM 200736026."***

Accordingly, during this moratorium period, examiners are instructed not to raise Sec. 263A issues. However, other dealership issues, including other inventory issues, should continue to be evaluated and examined if appropriate.

Auto dealership examinations in process as of September 15, 2009 may continue to develop Sec. 263A issues. In addition, dealerships currently under examination for which Sec. 263A issues are "issues under consideration" may elect to change their method of accounting. If they do so, the provisions of Sec. 6.03(4) of Rev. Proc. 2008-52 will be applicable.

On January 1, 2011, when examinations of auto dealership Section 263A issues resume, agents will be encouraged by the IDD to utilize the "audit tool kit" included as attachments to the Directive. Ominously, the IDD adds ... "Upon expiration of the suspension period, examiners are instructed to consider and apply all appropriate penalties."

Finally, the Directive states that it is not an official pronouncement of the law or the position of the Service and it cannot be used, cited or relied upon as such.

The IDD and a summary of its attachments which are collectively referred to as an "Audit Tool Kit" are included as supplementary information to this article.

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IRS MVTA WEBINAR DISCUSSES THE IDD

On November 18, IRS Motor Vehicle Technical Advisor, Ms. Terri Harris, presented a two-hour webinar for NADA. This was entitled, *"The New IRS Field Directive on UNICAP ... What It Means for You."*

Additional comments regarding this webinar are on page 28.

NADA SUBMITS A YEAR-END REQUEST FOR COST CAP RELIEF

In December, NADA submitted a request for relief from the IRS' oppressive interpretations of the application of the cost capitalization rules to automobile dealerships to the IRS Commissioner and other IRS officials. In addition to requesting relief, the "background" portion of the letter provides a comprehensive summary of how the IRS has continually changed its unofficial policy on addressing dealership Section 263A issues.

NADA's letter is reproduced, with permission, on pages 30-33.

THE CASE FOR DEALERSHIPS CHANGING SEC. 263A METHODS AT THIS TIME

During the Nov. 18 webinar discussion of the IDD, Ms. Harris indicated that what dealers should be doing at this time is evaluating whether to file Forms 3115 for changes in their cost capitalization methods.

There are several advantages to making a voluntary change to an IRS-designated automatic change method of accounting. With these kinds of changes, taxpayers have a certain amount of hindsight about whether or not to make the change because they are not required to file the Form 3115 until after the end of the year.

Voluntarily changing an accounting method - before the IRS requires a change - also eliminates significant exposure to potential penalties. Penalties, additions to the tax or additional amounts will not be imposed when a taxpayer changes from an impermissible method of accounting to a permissible one by complying with all of the applicable provisions.

If a Section 481(a) adjustment is required in order to avoid a distortion of income, for voluntary changes, that adjustment is usually made starting with the year of change, and not in an earlier year. In general, the spread period for a net positive Sec. 481(a) adjustment is 4 years and a net negative Sec. 481(a) adjustment may be taken into income (as a deduction) in the year of change.

One critical aspect related to a dealership's correction of its cost capitalization methodology has received very little attention in technical discussions. This aspect relates to the manner in which a dealership would proceed to correct or change its Sec. 263A methods.

The IRS Directive suggesting that dealerships change during the "suspension period" provides no guidance on whether the changes to be made would be regarded (i.e., qualify) as automatic changes in accounting method under Revenue Procedure 2008-52 or as changes that require advance permission from the IRS under Revenue Procedure 97-27. The difference between these two Procedures is significant.

Automatic change CAMs. If the dealership's change in a (Section 263A cost capitalization) accounting method can be made as an automatic change under Rev. Proc. 2008-52, the dealership would file Form 3115, *Application for Change in Accounting Method*, ***after*** the end of the year of change as part of the income tax return for that year. Because the change is automatic, no user fee is required to be paid.

The original Form 3115 must be attached to the dealership's timely filed (including extensions) original Federal income tax return when it is filed for the year of change. A copy of Form 3115 must also be filed with the IRS National Office in Washington, DC.

Greater hindsight for automatic CAMs. A significant benefit of being able to make a change under the automatic change provisions in Rev. Proc. 2008-52 is that the dealerships would have a significant opportunity to evaluate the advisability of making the change based on information available after the end of the year. That "after-the-fact" decision can be postponed for almost 9 months into the succeeding year to see if any events have occurred that might alter the advisability of filing Form 3115 to make the change.

Accordingly, the binding decision to elect the so-called TAM 200736026 method, if that change is considered to be an automatic change in method, does not have to be made until well after the end of the year. Would filing a Form 3115 to adopt the so-called TAM 200736026 method be considered to be ... one, single change ... or a bundle of two or more (i.e., several) individual, sub-method changes?

Non-automatic change CAMs. If the dealership's change in method does not fall under the automatic change provisions in Revenue Procedure 2008-52, the dealership must file its Form 3115 ***before*** the end of the year of change. In addition, it must also pay the IRS a user fee for processing Form 3115 and follow all of the requirements in Revenue Procedure 97-27 in order to secure advance permission from the IRS to make the change.

see **MORATORIUM**, page 18

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As noted previously, the Appendix to Revenue Procedure 2008-52 lists certain changes under Section 263A which may be made as automatic changes. This list is brief and was recently amended and clarified by Revenue Procedure 2009-39.

Unfortunately, because of the complexity of the provisions in Rev. Proc. 2008-52, as well as the significant variation in dealership fact patterns and approaches to cost capitalization, there could be significant problems if the IRS adopts hyper-technical interpretations concerning which Revenue Procedure should be used in a particular situation. Note that if, technically, the change in cost capitalization method is one requiring advance approval, then to be effective for calendar year 2009, that Form 3115 must be filed on or before December 31, 2009.

Two other aspects are significant. ***First,*** there are some circumstances in which a dealership may be ineligible to file Form 3115 for an automatic change in accounting method under Rev. Proc. 2008-52. A dealership must fall within the "scope" of Rev. Proc. 2008-52 in order to file under its more liberal provisions. If a "scope limitation" applies, the dealership's Form 3115 for a change in accounting method must be filed before year-end under Revenue Procedure 97-27 (and not under 2008-52).

There are two scope limitations that might prevent a taxpayer from being able to use the automatic change provisions where that taxpayer has made certain changes in the previous five years. This prior 5-year period includes the year of change, so it is really the year of change plus the four immediately preceding years that need to be examined to see if the taxpayer is eligible for an automatic change. These limitations are found in Section 4.02 and must be carefully reviewed.

Second, Revenue Procedure 2008-52 makes several distinctions between changes in methods, in sub-methods and changes in items. There is no discussion of how "rules" (as in cost cap "rules") fit into this overall pattern. It seems that, to date, most IRS discussions about dealerships changing Section 263A cost capitalization methods have not gone into the details or distinctions between *sub-methods, items* and *rules.* In short, in general discussions so far, none of these terms (which are apparently so important in Revenue Procedure 2008-52) have been reckoned with.

This is particularly important because Section 7.02(2) of the Rev. Proc. provides that in certain cases, there will be no audit protection for taxpayers prior to the year of change ... "If the taxpayer is changing a sub-method of accounting within the method." Query: How will this be interpreted in the context of the on-going discussions with the IRS on dealership cost capitalization?

Based on the foregoing, December 31, 2009 is the filing deadline for any cost capitalization changes that require advance approval from the IRS if the change is to be effective for calendar year 2009.

How can a dealership be sure whether the change it is requesting ... if it is a change to the so-called TAM 200736026 method ... will be accepted as an automatic change? The so-called TAM 200736026 method, per se, seems to have no precedential value. It says so right in the TAM ... and the IDD seems to recognize that.

The so-called TAM 200736026 method also seems to fail to satisfy the requirements found in Section 11 of the Appendix of Rev. Proc. 2008-52 (as modified by Rev. Proc. 2009-39) that the method to which a dealership is changing be one "***specifically*** described in the Regulations." So far, the Regulations have not been changed to ***specifically*** make that inclusion. However, the IRS might take the position that such inference could be made.

Another aspect to keep in mind when cost capitalization changes in method are made is that a Section 481(a) adjustment must be made regardless of whether the change is an automatic change or one that does not require advance permission from the IRS.

There is one other peril, already noted previously, but worth repeating. That peril is the possibility that the IRS might consider changes in how Section 263A is being applied to consist of a "bundle" of CAMs, some of which would be automatic and some of which would not be automatic. Regrettably, dealerships and their advisors, right now, are pretty much in the dark on this.

THE CASE AGAINST DEALERSHIPS CHANGING SEC. 263A METHODS AT THIS TIME

Obviously, one's first inclination might be to go ahead and make a change or some changes at this time.

On the other hand, there are a number of unanswered questions and complications which have not been addressed - either adequately, partially or at all - in any official capacity or by any of the various IRS *Teams* or offices tasked with providing guidance. Some of these problems have already been suggested and/or discussed in this article. On page 22, you'll find more concerns and ramifications of "jumping the gun" at this time.

Bottom line ... Better wait, at least for now, to rush into the jungle out there.

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Part 1 Summary — PRODUCTION & HANDLING ACTIVITIES ... ISSUES & HOLDINGS

Six Major Issues (#1-6)	*IRS Holdings*
1. Under the following circumstances, whether the Taxpayer's installation activities constitute production activity... a. Installation of parts by the Taxpayer's service department personnel on i. Customer-owned vehicles ii. New vehicles owned by Taxpayer iii. Used vehicles owned by Taxpayer b. Sublet Repairs/Installation of parts by subcontractors on i. Customer-owned vehicles ii. New vehicles owned by Taxpayer iii. Used vehicles owned by Taxpayer	1. ***Customer-owned vehicles.*** With respect to customer-owned vehicles, when the Taxpayer or a subcontractor installs parts to customer-owned vehicles, the installation activity ***does not*** constitute production activity for purposes of Section 263A. This is because the Taxpayer does not hold the underlying benefits and burdens of ownership of the vehicle. • ***Taxpayer-owned vehicles.*** With respect to new and/or used vehicles owned by the taxpayer, when the Taxpayer or a subcontractor installs parts to new and/or used vehicles owned by the Taxpayer, the installation of parts ***may*** constitute production activities. • Applicable Regulation is Reg. Sec. 1.263A-2(a)(1).
2a. Whether auto repair/installation activity constitutes service activity with respect to customer-owned vehicles. 2b. Whether the parts provided in the auto repair/installation activity constitute property provided in the provision of services with respect to customer-owned vehicles.	2. Because the Taxpayer accounts for the parts as inventory, the Taxpayer does not qualify for the "property provided incident to services" exception set forth in the Regulation. • Applicable Regulation is Reg. Sec. 1.263A-1(b)(11).
3. Whether the Taxpayer is eligible for the *de minimis* exception.	3. Because the Taxpayer's total indirect costs exceed $200,000, the Taxpayer does not qualify for the *de minimis* rule/exception. • Applicable Regulation is Reg. Sec. 1.263A-1(b)(12).
4a. Whether the Taxpayer is a reseller with production activities. 4b. If the Taxpayer is a reseller with production activities, whether those activities qualify as *de minimis* production activities.	4. The National Tax Office ***cannot determine whether the Taxpayer qualifies*** for the ***de minimis*** production presumption test. • If the examining agent applies a facts and circumstances test, taking into account volume, the Taxpayer's production activities relating to property subject to Section 263A ***may be de minimis.*** • Applicable Regulation is Reg. Sec. 1.263A-3(a)(2)(iii)(A).
5. Whether the Taxpayer's repair/installation activities are handling costs.	5. Costs attributable to repair/installation activities with respect to customer-owned vehicles are handling costs. • Costs attributable to certain ***minor*** repair/installation activities with respect to Taxpayer-owned vehicles are also handling costs. • Applicable Regulation is Reg. Sec. 1.263A-3(c)(4).
6. If the Taxpayer is permitted to use the simplified resale method because it has *de minimis* production, how are the production costs accounted for in the formula? *Note: This conclusion makes little practical difference because under the simplified resale method, the combined absorption ratio is defined as the sum of both of these absorption ratios. (Reg. Sec. 1.263A-3(d)(3)(i)(C))*	6. Under the simplified resale method, the materials and labor costs presently capitalized to inventory are Section 471 costs. ◆ These costs are included in (both) the denominator of the formula as well as in the multiplicand. • The indirect costs relating to production activities are treated as additional Section 263A costs. ◆ These costs are included in ***either*** (1) the storage and handling costs absorption ratio ***or*** (2) the purchasing costs absorption ratio.

Part 2 Summary	RETAIL SALES FACILITY ... ISSUES & HOLDINGS

Three Major Issues (#7-9)	Holdings
7. Do the following sales constitute on-site sales to retail customers? a. Vehicles taken in trade or purchased at auction and subsequently resold at wholesale, b. Vehicles sold to another dealership at cost, c. Vehicles leased, d. Vehicles sold as part of a fleet sale, and e. Wholesale sales of parts to purchasers who are, or are not, end users where the parts are picked up at the Taxpayer's parts department by the purchaser or delivered to the purchaser by a driver from the Taxpayer's parts department.	7. The following *are not* (considered to be) on-site sales ... ◆ Vehicles resold at wholesale ◆ Vehicles sold to another dealership at cost ◆ Leased vehicles • Some parts sales are not on-site sales to retail customers. • The following *are* (considered to be) *on-site sales* ... ◆ Parts sales made at Location 1 to end user retail customers ◆ Fleet sales to retail customers
8. Is the Taxpayer's storage facility at Location 1 an on-site, off-site, or dual-function storage facility? ◆ [i.e., How should this storage facility be classified?]	8. The Taxpayer's storage facility at Location 1 is a *dual-function* storage facility.
9. Is the Taxpayer's storage facility at Location 2 an on-site, off-site, or dual-function storage facility? ◆ [i.e., How should this storage facility be classified?]	9. The Taxpayer's storage facility at Location 2 is an *off-site* storage facility.

Specific Facts Regarding Dealership's Two Locations

Two Locations	• The Taxpayer stores vehicles at its main sales facility, Location 1. • The Taxpayer also stores vehicles at Location 2. This location is one-half mile from Location 1. ◆ There is no sign at Location 2 indicating that it is owned by the Taxpayer. ◆ There is no sales office at Location 2.

Capitalization as Inventory Costs vs. Immediate Deduction ... and Cost Allocations

For sales that are not on-site sales ... (in other words, for sales that are off-site sales) ... all allocable expenses must be capitalized. Accordingly, the Taxpayer must capitalize expenses allocable to

1. Vehicles resold at wholesale
2. Vehicles sold to another dealership at cost
3. Leased vehicles
4. Parts sales made at Location 1 to purchasers who are not the end user retail customers

For sales that are on-site sales, all allocable expenses may be deducted. Thus, the Taxpayer may deduct expenses allocable to

1. Fleet sales to retail customers
2. Parts sales made at Location 1 to end user retail customers

Parts sales analysis. A proper analysis separating on-site from off-site sales of parts will require a determination of whether the purchaser is actually the end user. Accordingly, a sale by the taxpayer's parts department to another dealership's parts department (even if that dealership's employee may physically come to the taxpayer's parts department to pick up the parts purchased) would be considered to be an off-site sale because the "end user retail customer" would be the individual customer of the purchasing dealership, rather than the purchasing dealership entity.

Since the storage facility at Location 2 is an off-site storage facility, all expenses allocable to that facility must be capitalized.

Since the TAM concludes that the storage facility at Location 1 is a dual-function storage facility, that means that a determination must be made that allocates the costs related to the storage function to arrive at how much of these costs may be expensed and how much must be capitalized. For this purpose, the allocation between the off-site storage function and the on-site storage function is made by using the ratio of

- *Gross on-site sales* of the facility (i.e., gross sales of the facility made to retail customers visiting the premises in person and purchasing merchandise stored therein); to
- *Total gross sales* of the facility. For this purpose, the total gross sales of the facility include the value of items shipped to other facilities of the taxpayer.

For example, if the on-site sales at a dual-function facility are 40% of the total gross sales of the facility, then 40% of the facility's storage costs are allocable to the on-site storage function and are not required to be capitalized.

Note: See Selected Purchasing, Handling & Storage Definitions, Allocation Rules & De Minimis Exceptions *on page 26.*

Part 3 Summary	***IDENTIFICATION & ALLOCATION OF COSTS ... ISSUES & HOLDINGS***

Three Major Issues (#10-12)	*Holdings*
10a. Whether purchasing, storage and handling costs are mixed service costs under the ***simplified production method.***	10a. Purchasing, storage and handling costs are not mixed service costs under the simplified production method. • This TAM conclusion is qualified by the language... "Under the circumstance described below..." apparently referring to the detailed discussion of the Taxpayer's facts and the TAM's analysis. • Applicable Regulation is Reg. Sec. 1.263A-3(c)
10b. Whether purchasing, storage and handling costs are mixed service costs under the ***simplified resale method.***	10b. Purchasing, storage and handling costs are not mixed service costs under the ***simplified resale method.*** • This TAM conclusion is qualified by the language... "Under the circumstance described below..." apparently referring to the detailed discussion of the Taxpayer's facts and the TAM's analysis. • Applicable Regulation is Reg. Sec. 1.263A-3(c)
11. Which costs are mixed service costs for purposes of the ***simplified service cost method***?	11. The following costs are mixed service costs for purposes of the simplified service cost method: ◆ Salaries - executive costs including payroll taxes and employee benefits ◆ Salaries - administrative costs including payroll taxes and employee benefits ◆ Rent, real estate taxes, utilities, repairs and office supplies allocable to administrative departments ◆ Data processing costs ◆ Legal and audit costs • This TAM conclusion is qualified by the language... "Under the circumstance described below..." apparently referring to the detailed discussion of the Taxpayer's facts and the TAM's analysis.
12. Provided that the Taxpayer's ***self-developed*** method for capitalizing additional Section 263A costs is not a proper method, ***what method of accounting can the examining agent use*** in order to compute the Taxpayer's taxable income?	12. The Commissioner may require the Taxpayer to use ***any method that*** (in his opinion) ***clearly reflects income.*** • Permissible methods suggested by the TAM include... ◆ A reasonable method under Reg. Sec. 1.263A-1(f)(4). ◆ The simplified production method ◆ The simplified resale method *if* Taxpayer's production activities are *de minimis*." ◆ A facts-and-circumstances allocation method. • *Note:* Although the "clear reflection of income" standard seems to leave the door wide open for the examining agent, the "facts and circumstances" and "other reasonable methods" would seem to open another door for the taxpayer.

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Some (Random) Thoughts

THE CASE AGAINST DEALERSHIPS "JUMPING THE GUN" TO CHANGE COST CAP METHODS FOR 2009 BASED ON IRS' IDD

In General

- This discussion might be considered under the heading: *Why Clarification Is Needed before Dealers Proceed with Filing Section 263A Change Requests for 2009.*
- Patience is a virtue ... There appear to be numerous problems and pitfalls associated with the suggestion that dealers should jump right in and file Forms 3115 before the end of the year (or otherwise change their cost cap methods effective for calendar year 2009).

Is This for Sure?

- If "this Directive is not an official pronouncement of the law or the position of the Service and cannot be used, cited or relied upon as such," then dealers filing Forms 3115 to change to the so-called "TAM Method" have no guarantee that the IRS may not change its mind at some later date regarding computational techniques in the future.

Which Revenue Procedure Should Be Used to Make the Change(s)?

- Would a change to the so-called "TAM Method" be an automatic change ... or is advance approval (with the filing of Form 3115 before the end of the year and payment of a filing/user fee) required?
  - The Directive states "IRC Section 263A 'issues' are methods of accounting, and taxpayers who desire to change their method of accounting must file a Form 3115 - *Change in Method of Accounting.*"
  - With respect to the term "issues," is that collectively, or individually ... how finely does this get broken down?
- The Directive does not state whether the change to the so-called "TAM Method" (which it is encouraging) is an automatic change or one that requires advance consent.
  - The IRS Motor Vehicle Technical Advisor, in her presentation on November 18, added no certainty or clarification. She did say that "some changes" may be automatic. But which ones?
- This is discussed more in the accompanying article.

Could the Regs Be Wrong?

- Rev. Proc. 2009-39 states that "Section 11.01(2)(g) of the Appendix to Revenue Procedure 2008-52 is clarified to read,
  - "A UNICAP method specifically described in the Regulations includes ... [various sub-methods are itemized here]," ... ***but does not include any other reasonable allocation method within the meaning of Reg. Sec. 1.263A-1(f)(4).***
  - It appears many dealerships would be basing an argument for the propriety of their current "self-developed" Section 263A methods on this Regulation by claiming that the method they were using is a "reasonable allocation method within the meaning of the -(f)(4)" portion of the Regulations.

Quasi- or Hybrid-TAM Methods...

Compliance with Substantially All Aspects of the TAM

- TAM 200736026 involves 6 major issues which are expanded to include several lesser or minor related issues.
  - Must a dealership actually concede to all of the holdings of the IRS in the TAM, or can a dealership parse out those with which it does not agree and change only to those methods required by the Service with which it is in agreement?
- What would happen if a taxpayer wanted to change to the so-called "TAM Method," but did not want to agree to all of the holdings of the TAM?
- For example, assume the taxpayer would concede everything except the handling of lease sales as off-site sales. Would that modification (i.e., conceding all Sec. 263A interpretations except lease sale treatment) result in a quasi-TAM 200736026 method that the IRS would permit the dealership to adopt?
  - If the Service would accept that quasi- or hybrid-TAM method, would the taxpayer be required to secure permission in advance to make the change (i.e., file Form 3115 under Rev. Proc. 97-27) or could that change be made as an automatic change under Rev. Proc. 2008-52?

What About the Concession On Leasing the IRS Seemed Willing to Make?

- With respect to IRS Counsel's response to NADA's concerns about lease transactions (discussed in the article on page 15-16), it appears that Counsel was ready to concede that point in favor of NADA. Retail Counsel even suggested that the Regulations be changed to provide as follows ... *"Certain other non-retail customers treated as retail customers. With respect to this Section, in the case of an automobile dealership which is a retail sales facility, a lessor [lessee?] of a vehicle, which vehicle immediately prior to inception of the lease is physically located at the retail sales facility or in on-site storage, shall be treated as a retail customer."*
  - It seems this would be overlooked ... and conceded ... by any dealership agreeing to change to the TAM method in its entirety.

Some (Random) Thoughts	THE CASE AGAINST DEALERSHIPS "JUMPING THE GUN" TO CHANGE COST CAP METHODS FOR 2009 BASED ON IRS' IDD Page 2 of 2
IRS Treatment of Dealers Using LIFO	• Many automobile dealerships are still using the Alternative LIFO Method for New Vehicles. • Many other dealerships are using the IPIC LIFO method for valuing their inventories. • The Regulations under Sec. 263A contain specific provisions for the treatment of amounts capitalized where taxpayers are using the LIFO method. • The rationale for ignoring these Regulations has not been satisfactorily explained, so far, in the TAM or in any other (informal) discussions by the IRS. ◆ The Sec. 263A combined absorption ratio is simply applied to the total amount of the Section 471 inventory costs. • Although there is an obscure provision in the Regulations that might account for this, such application is grossly unfair to automobile dealers, particularly those who have experienced (or are currently experiencing) reductions in their ending inventory levels. ◆ The appropriate treatment where there is a decrement is to go back and remove a portion of the Section 263A costs capitalized with respect to increments that were experienced in previous years.
Section 481(a) Adjustments	• When a dealership changes its cost cap method, an adjustment under Section 481(a) required. ◆ How is the Section 481(a) adjustment to computed if the dealership is not using LIFO? ◆ How is the Section 481(a) adjustment to computed if the dealership is using LIFO?
Methods, Sub-Methods vs. "Rules"	• All of the discussion that the IRS has advanced to date refers to changing Section 263A methods of accounting. These discussions seem to ignore the fact that in Revenue Procedure 2008-52 and many other places, a distinction is made between changing an accounting ***method*** and changing a ***sub-method.*** • In the context of a dealership changing Sec. 263A cost capitalization methods, where are the lines of demarcation to be drawn between changing methods versus changing sub-methods?
Scope Limitation	• If the change is considered to be an automatic change, it will be necessary to determine that the scope limitations contained in Revenue Procedure 2008-52 do not prevent the application from being automatic. • There are special provisions in Rev. Proc. 2008-52 that deal with changes made within the last 5 years in a sub-method. • Are these to be applied any differently in the case of Section 263A method changes?
Lack of Audit Protection	• Are dealerships aware of the lack of audit protection in making these changes if the IRS adopts a harsh interpretation of Section 7 of Rev. Proc. 2008-52?
Problems if the IRS Is Delayed in Responding to Filings under Rev. Proc. 97-27	• What if ... both the IRS and the dealership agree that the cost cap changes that the dealer wants to make require advance permission and the dealership has timely filed Form 3115 (before the end of the year) requesting permission? • However, by the time the dealership is ready to file its income tax return for the year of change (say, 2009), it still has not received permission from the IRS to make the change(s) it is requesting? • There are significant practical problems in this case. ◆ If permission to change to the desired cost capitalization method of accounting has not been received from the IRS by this time, a taxpayer is required to ▪ File its tax return continuing to use the "improper method" (for the year of intended change), and ▪ Subsequently file an amended return to reflect the new method of cost capitalization after permission to change has been received from the IRS. ◆ This becomes cumbersome (a nightmare?) where individual returns for many partners or shareholders of flowthrough entities are involved and/or where multiple state income tax return filings must be made.
Pending Litigation	• There is currently at least one case docketed in the Tax Court contesting the positions of the IRS in TAM 200736026. • Wouldn't it be advisable to await the outcome before proceeding?

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SECTION 263A - COMMENTS SUBMITTED BY NADA ... JUNE 26, 2009 IN RESPONSE TO IRS NOTICE 2009-25

I. General Comments 1

II. Comments Concerning Various Definitions & Terms
- A. On-site sales/retail customer - Vehicle lease transactions 2
- B. On-site sales/retail customer - Fleet sales of vehicles 4
- C. On-site sales - Internet sales of vehicles 5
- D. On-site sales - Sales of certain vehicles through wholesalers or through auctions 5
- E. Vehicle sales to another dealership at cost 5
- F. Warranty work 6

III. Comments Concerning other Section 263A Issues
- A. Installation of parts by a dealership's service department and sublet repairs/installation of parts by ***subcontractors on customer-owned vehicles*** 6
- B. Installation of parts by a dealership's service department and sublet repairs/installation of parts by ***contractors on dealership-owned vehicles*** 6
- C. Dealership service department accounting practices 7
- D. ***De minimis*** production 8
- E. Separate and distinct on-site storage facilities 8
- F. Simplified method vs. facts and circumstances method 9

IV. Generic Legal Advice -- Before the IRS issued TAM 200736026, it began an initiative to provide UNICAP guidance to automobile dealerships in the form of a Generic Legal Advice Memorandum (GLAM), which was not subsequently issued. To assist in the preparation of the intended GLAM, the IRS sought and received from NADA responses to several questions, which appear below. This information highlights some of the issues that should be resolved so that the IRS and automobile dealerships can properly apply Section 263A.
- A. Is an automobile dealership a reseller pursuant to Treasury Regulation Section 1.263A-3(a)(1) or a reseller with production activities pursuant to Treasury Regulation Section 1.263A-3(a)(2)? 10
  - Service work on vehicles owned by customers 10
  - Service work on vehicles held for resale 11
- B. If a Dealership is considered to be a reseller with production activities, will the Dealership qualify for the *de minimis* production activity exception set forth in Treasury Regulation Section 1.263A-3(a)(2)? 14
- C. For purposes of the *de minimis* production activity test at Treasury Regulation Section 1.263A-3(a)(2)(iii), can the Parts Department and/or the Service Department be treated as separate trades or businesses? If so, is the Parts Department a producer? Is the Service Department a producer? 17
- D. If a dealership is considered to be a producer and meets the de minimis production activities test within the meaning of Treasury Regulation Section 1.263A-3(a)(2)(iii), may the Dealership elect the simplified resale method set forth in Treasury Regulation Section 1.263A-3(d)? 19
- E. If a dealership may elect the simplified resale method, must it include its additional IRC Section 263A costs relating to its production activity in its dual absorption ratio under the simplified resale method? 19
- F. If a Dealership has elected the 1/3-2/3 rule under Treasury Regulation Section 1.263A-3(c)(3)(ii)(A), how is the rule to be applied? 21
- G. If dealerships are determined to be producers, must they use the Simplified Production Method or are there other permissible methods that dealerships may use? 22

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Industry Directors Directive (IDD)	***AUDIT TOOL KIT*** ***Intended to Encourage Consistent Approach by IRS Examining Agents to Sec. 263A Cost Capitalization Issues***
12-Step Audit Plan	• The Audit Plan consists of 12 steps, each with detailed explanations and computations for determining and/or identifying costs to be considered for capitalization. • Each step is referenced to specific issues in TAM 200736026 and/or to specific Regulation Sections. • The 12 steps are... 1. Determine off-sight storage portion of dual-function storage facility 2. Determine off-site portion of dual-function storage facility costs 3. Determine off-site storage facilities 4. Identify production costs 5. Identify handling costs 6. Identify purchasing costs 7. Determine total mixed service costs 8. Apportion mixed service costs between purchasing and storage & handling 9. Calculation storage & handling ratio 10. Calculate purchasing ratio 11. Calculate simplified resale combined absorption ratio 12. Calculate amount of additional 263A costs required to be capitalized ◆ This is done by applying the combined ratio to current year IRC Section 471 costs. ◆ Note: This totally ignores the portions of the Section 263A Regulations that provide different rules for applying additional Section 263A costs to the inventory where the inventory is valued using the Last-In, First-Out (LIFO) method.
Computational Spreadsheet Templates	• These are detailed worksheets coordinated with each of the 12 steps in the Audit Plan. • There are no numbers or amounts included in the individual worksheets. Accordingly, it is impossible to see how numbers would be carried forward to succeeding worksheets. • It appears that these templates have been used by the IRS in various audits over the last few years. Anecdotal experiences suggest that these templates have been developed "on the run" and consistently revised. • It would be helpful if there was some indication on these templates as to how these numbers would or could be derived from a dealership's financial statements or other internal data. • NADA's letter of December 1, 2009 requesting relief referred to these attachments as containing "significant flaws that can lead to distortions of income."
Terms & Definitions	• This section of the Kit contains definitions of most, if not all, of the key terms that are involved in the 12-step Audit Plan. • The definitions are presented or coordinated with each of the 12 steps in the Audit Plan.
Information Document Requests	• Not released by IRS • For an example of a recent Information Document Request, see *Dealer Tax Watch*, September 2007, pages 24-25.
MVTA Comments	• During the NADA webinar presented by Ms. Terri Harris on the new IRS Field Directive on UNICAP, she made the following comments related to the *Audit Tool Kit*. ◆ During the moratorium period on raising Sec. 263A issues in dealerships, Ms. Harris said she expects the IRS to (1) evaluate the *Tool Kit* (2) evaluate the overall compliance level by the dealership industry and (3) work on training agents in the field. ◆ Ms. Harris said that she hoped there would be an example in the *Tool Kit*, when it is revised, that would address dealerships using LIFO... how costs capitalized under Section 263A would be allocated to the LIFO layer structures, etc. ◆ Ms. Harris expects that when the *Audit Tool Kit* is perfected, it would be made into an *Audit Technique Guide*.

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LARGE AND MID-SIZE BUSINESS DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

LMSB-4-0909-035
Impacted IRM 4.51.5

September 15, 2009

MEMORANDUM FOR LMSB INDUSTRY DIRECTORS
DIRECTOR, PREFILING AND TECHNICAL GUIDANCE
DIRECTOR, FIELD SPECIALISTS
LMSB AREA COUNSEL

FROM: Charlie Brantley
Industry Director, Heavy Manufacturing and Transportation and Issue Owner

SUBJECT: Tier III – Field Directive on the Planning and Examination of IRC § 263A issues in the Auto Dealership Industry

Introduction
This memorandum is intended to provide direction to the field to effectively utilize resources in the evaluation and examination of auto dealership issues under Internal Revenue Code (IRC) § 263A. For purposes of this Directive, auto dealerships are defined as businesses that sell and service new and/or used passenger vehicles, light trucks, and medium and heavy duty trucks.

This Directive is not an official pronouncement of the law or the position of the Service and cannot be used, cited, or relied upon as such.

Background
IRC § 263A and the accompanying regulations require that certain taxpayers include in inventory costs the direct and indirect costs properly allocable to property that is inventory. Generally, auto dealerships are subject to the provisions of IRC § 263A.

Although a Technical Advice Memorandum (TAM) is not authoritative guidance, the legal reasoning included in TAM 200736026 may be instructive for auto dealership examinations. The TAM is a comprehensive document addressing multiple issues and sub-issues and must be reviewed in its entirety to properly analyze all issues. However, in part, the TAM concluded that when the taxpayer or a subcontractor installs parts to new and used vehicles owned by the dealership, the activities may constitute production activities under IRC § 263A(g)(1) and Treas. Reg. § 1.263A-2(a)(1)(i). Costs attributable to repair/installation activities with respect to customer-owned vehicles may constitute handling costs under section Treas. Reg 1.263A-3(c)(4). Additionally, vehicles sold at wholesale, vehicles sold to another dealership at cost, leased vehicles, and some parts sales generally are not on-site sales to retail customers.

IRS MORATORIUM ON RAISING SEC. 263A ISSUES IN DEALERSHIP EXAMINATIONS ... SEPT. 15, 2009 - DEC. 31, 2010

IRC § 263A issues are methods of accounting, and taxpayers who desire to change their method of accounting must file a Form 3115 Change in Method of Accounting. In some cases, a change in method of accounting to comply with IRC § 263A requires the advance consent of the Commissioner.

The IRS classified auto dealership § 263A issues as a Tier III issue because of a high level of taxpayer non-compliance. Tier III issues include industry risks that represent the highest compliance risk for a particular industry. A Tier III issue management team was formed and tasked with assessing the level of industry compliance and the development of audit tools to assist examiners in evaluating and examining the issues. The audit tool kit for IRC § 263A is intended to encourage a consistent approach to the issue and consists of (1) Information Document Requests (IDR), (2) a 12 step Audit Plan, (3) multiple Key Terms and Definitions documents keyed to the audit plan steps, and (4) a computational spreadsheet. (See the links at the end of this document for the tool kit items.)

Planning and Use of Examination Resources

In order to encourage compliance and to allow taxpayers in the auto dealership industry an opportunity to voluntarily change their methods of accounting to comply with the legal reasoning outlined in TAM 200736026, the IRS has determined that it will suspend examination of auto dealership § 263A issues effective September 15, 2009 and continuing through December 31 2010.

During this period, examiners are instructed not to raise IRC § 263A issues on auto dealership examinations. Other dealership issues, including other inventory issues, should continue to be evaluated and examined if appropriate. IRC § 263A issues in other industries should also continue to be evaluated and examined if appropriate.

Auto dealership examinations in process as of September 15, 2009 may continue to develop § 263A issues. However, dealers currently under examination for which § 263A issues are issues under consideration, as defined in Revenue Procedure 2008-52, 2008-2 C.B. 587, section 3.09(1), may elect to change their method of accounting, and Rev. Proc. 2008-52 section 6.03(4) will be deemed to apply.

Effective January 1, 2011, examination of auto dealership § 263A issues will resume, and examiners are encouraged to utilize the audit tool kit discussed above. Additionally, upon the expiration of the suspension period, examiners are instructed to consider and apply all appropriate penalties.

Issue Tracking

The following UIL codes apply:

263A.01-01,
263A.01-02,
263A.02-11,
263A.02-12,
263A.04-00,
263A.04-04,
263A.04-05,
263A.04-06

Exhibits

Audit Plan

Terms and Definitions

Computational Spreadsheet

If you have any questions, please contact Motor Vehicle Technical Advisor, Terri Harris at 616-365-4601.

cc: Commissioner, LMSB
Deputy Commissioner, LMSB
Division Counsel, LMSB
Commissioner, SBSE
Chief, Appeals
Director, Performance, Quality and Audit Assistance

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Section 263A

THE NEW IRS FIELD DIRECTIVE ON UNICAP & WHAT IT MEANS TO YOU
PRESENTED BY TERRI HARRIS, MOTOR VEHICLE TECHNICAL ADVISOR
Moderated by Paul Metrey, NADA Legal and Regulatory Group
November 18, 2009

- This presentation was approximately two hours, and it was moderated by Paul Metrey, NADA Director, Regulatory Affairs. He gave an introduction which was a very basic overview of the major issues and NADA's interaction with the IRS.
- Terri Harris, the IRS Motor Vehicle Technical Advisor, presented the seminar. Ms. Harris explained that she was not the official spokesperson for the IRS on this matter and that she would only be expressing her personal opinions.
- The PowerPoint summaries that she used are on the facing page.
- She indicated that the findings of the Service in auditing Section 263A methods used by dealerships were that generally, (1) dealers capitalized costs relating to off-site storage lots and some (but not a lot) of purchasing costs and (2) most dealers applied (elected) the 1/3-2/3 rule.
- Ms. Harris indicated that one area of inquiry was whether the dealership ever followed the procedures to properly make/formalize the elections to use the short-cut methods. In addition, were these elections timely filed?
- She indicated that she thought the facts of the dealership in the TAM are "relatively representative" of the facts that the IRS sees in many other dealership situations. Ms. Harris added that there was every indication that Chief Counsel would come to the same conclusion(s) if similar dealership facts were presented for review.
- Ms. Harris discussed the difference in the Form 3115 filing requirements for (1) changes in accounting methods (CAMs) that are automatic (filed under Rev. Proc. 2008-52) and (2) changes that require advance consent or permission from the IRS before they can be made (filed under Rev. Proc. 97-27).
- She indicated that some Section 263A CAMs would be automatic and some may fall under the advance approval requirement. Ms. Harris also referred to the recent changes made by Rev. Proc. 2009-39 which modify Rev. Proc. 2008-52. Unfortunately, she did not carry her discussion any further nor specify which changes might be automatic and which ones would not be.
- Ms. Harris indicated that the Tier III Team does not have authority to set up a "safe-harbor" approach for dealership cost capitalization. However, the Team does have authority to issue informal guidance.
- During the moratorium period on raising Sec. 263A issues in dealerships, Ms. Harris said she expects the IRS to (1) evaluate the *Tool Kit* (2) evaluate the overall compliance level by the dealership industry and (3) work on training agents in the field.
- If Section 263A issues are raised on a dealership examination during the moratorium period because the issue was pending on September 15, Ms. Harris said that the examining agent may accept a Form 3115 from the dealership "if it is filed in good faith."
- With respect to the IRS Business Plan, Ms. Harris that she anticipated there might be a Revenue Ruling issued in the future. She indicated that she did not expect that it would contradict the findings in TAM 200736026. In addition, she said that the Ruling might simply pick and choose which issues in the TAM it would address. (Note that the Revenue Ruling would have precedential value.)
- There is a case that is currently docketed in the Tax Court contesting the application of the TAM holdings to a dealership. No action has been taken on this to date. (Query: Could the taxpayer in the TAM be the same one docketed in the Tax Court?)
- Ms. Harris expects that when the *Audit Tool Kit* is perfected, it would be made into an *Audit Technique Guide*.
- After these comments, the remainder of the time was devoted to questions and answers.
- Regarding the so-called "zero UNICAP" method ... if this method is being used, there are special considerations because, although the result is that no costs are being capitalized, the underlying technical issue is ... were the appropriate Section 263A elections timely filed in order to entitle the dealership to use the short-cut methods?
  - In other words, if a Form 3115 wasn't filed, the taxpayer is not on record with the IRS as having made these elections.
  - Is the result that the dealership has no Section 263A method of accounting? Potential problems are far greater if a dealership has "***no*** Section 263A method of accounting" than if it has a "***self-developed*** Section 263A method of accounting."

The New IRS Field Directive on UNICAP & What It Means to You
Presented by Terri Harris, Motor Vehicle Technical Advisor
Moderated by Paul Metrey, NADA Legal and Regulatory Group
November 18, 2009

- Ms. Harris mused that, theoretically, there could be a violation of the LIFO conformity requirement (not the cost requirement) if the dealership were not properly capitalizing all costs required by Section 263A.
- Ms. Harris indicated that if a dealership is using LIFO, "that would have to be factored into the LIFO layers." This seems to contradict an earlier statement that she made indicating that the absorption ratio calculated for Section 263A costs would be applied to "a pool of inventory costs." In fact, Step 12 of the *Audit Tool Kit* disregards a dealership's use of LIFO in applying the ratio to the total amount of Section 471 costs.
    - Ms. Harris said that she hoped there would be an example in the *Tool Kit*, when it is revised, that would address dealerships using LIFO... how costs capitalized under Section 263A would be allocated to the LIFO layer structures, etc.

Summary of IRS MVTA's Talking Point Slides

Slide 1	• IRC 263A - Requires taxpayers with gross receipts over $10 million to capitalize direct and indirect costs allocable to ... Property acquired for resale. • What does this mean for dealerships? ◆ Dealers must capitalize certain costs, i.e., add the cost to inventory value rather than take a current deduction.
Slide 2	• Historically, dealerships have capitalized... ◆ Off-site storage, if appropriate ... For example a lot across town where customers don't visit. ◆ Purchasing costs ... For example an employee who spends a considerable amount of time involved in purchasing activities (more than 1/3 of their days) • TAM 200736026 ... Published September 2007 ◆ Concluded that considerably more costs need to be capitalized rather than currently deducted and ◆ Dealer's historic methods are improper.
Slide 3	• TAM 200736026 ... The conclusions ◆ Dealership activity related to customer-owned vehicles does not constitute production activities. ◆ Dealership activity related to dealership-owned vehicles ***may*** constitute production activities. • What does this mean to dealers? ◆ Dealers are required to capitalize and not currently deduct additional costs related to service department including parts, labor and overhead.
Slide 4	• TAM 200736026 ... The conclusions ◆ Dealer's main location is a dual function storage facility ▪ Why? ... Because vehicles sold at wholesale, sold to another dealership at cost (dealer trades), leased vehicles and ***some*** parts sales are not on-site sales to retail customers. ◆ What does this mean for dealers? ▪ Costs at the dealership location must be allocated between on-site and off-site sales, and ▪ Additional costs associated with the off-site portion must be capitalized rather than deducted.
Slide 5	• What does this mean for dealerships? ◆ It is anticipated that nearly all dealerships are non-compliant with the Treasury Regulations. ◆ To become compliant - dealers need to change their method of accounting. • What is a method of accounting and how can it be changed? ◆ Form 3115 - *Application to Change a Method of Accounting*
Slide 6	• Designated as a Tier III Issue • Update on recent Tier III Team Activity ... What does this mean for dealers? • Industry Director's Directive (IDD) - September 15, 2009

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NADA'S REQUEST TO IRS FOR SECTION 263A RELIEF
DECEMBER 1, 2009

NATIONAL AUTOMOBILE DEALERS ASSOCIATION
8400 Westpark Drive • McLean, Virginia 22102
703/821-7040 • 703/821-7041

Legal & Regulatory Group

December 1, 2009

Via E-Mail

Hon. Michael Mundaca
Acting Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Hon. Douglas H. Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Hon. William J. Wilkins
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20220

Hon. Heather C. Maloy
Commissioner
Large and Mid-Size Business Division
801 9th Street, N.W.
Washington, D.C. 20001

Re: UNICAP Examinations of Franchised Car & Truck Dealers

Dear Distinguished Officials:

On behalf of the National Automobile Dealers Association (NADA),[1] we are writing to request that the Department of the Treasury and the Internal Revenue Service suspend Uniform Capitalization (UNICAP) examinations under section 263A of the Internal Revenue Code of franchised car and truck dealers until Treasury and the IRS have an opportunity to revise the implementing Treasury regulations in a manner that addresses the full range of UNICAP issues affecting dealers. As explained below, a recent memorandum from the IRS Director, Heavy Manufacturing and Transportation (HMT) Industry directs dealers to change their accounting methods before such a revision could likely occur and bases the change on a non-precedential technical advice memorandum and a new "audit tool kit" that is flawed and can result in significant distortions of income. This unfortunate development will, if not corrected, create a severe hardship for dealers at a time when the automobile industry is reeling from two major manufacturer bankruptcies, massive industry reorganization, unprecedented problems accessing retail and wholesale credit, and a 26% reduction in new vehicle sales. Accordingly, we request your direct involvement to prevent the adverse consequences that will result from this field directive.

Background

Below is a brief summary of how this unofficial policy change arose.

[1] NADA represents approximately 17,000 franchised dealers in all 50 states and the District of Columbia who sell new and used vehicles and engage in service, repair, and parts sales. NADA's members include over 2,000 franchised dealers who sell medium- and/or heavy-duty trucks. Our members collectively employ upwards of 1 million people nationwide.

Please see the IRS CIRCULAR 230 DISCLOSURE on the bottom of page 4.

2

- Section 263A was added to the Internal Revenue Code in 1986 to ensure that businesses capitalize, instead of expense, indirect as well as direct costs associated with their production and resale activities.

- Beginning in 2005, we became aware, for the first time, of a revenue agent classifying an automobile dealer as a producer and classifying many routine dealer transactions as not constituting on-site retail sales. After concluding that the dealer undercapitalized costs associated with these activities, the revenue agent proposed adjusting the dealer's income by approximately $600,000. We subsequently received similar reports from other automobile dealers and also learned that revenue agents were applying this novel approach to commercial truck dealers.

- This audit activity occurred notwithstanding the fact that (i) revenue agents had not raised these issues in the two decades since section 263A was added to the Code, and (ii) the Service had approved thousands of dealer applications for a change in accounting method (IRS Form 3115) that authorized dealers to be treated as retailers who could utilize special allocation and *de minimis* rules that do not require the capitalization of these costs.

- Once it became clear that these audits were not isolated and were being coordinated nationally, NADA engaged the Service to determine the basis for this policy change and to seek comprehensive guidance on the full range of UNICAP issues affecting franchised dealers.

- The HMT Industry Director[2] informed NADA in July 2006 that although the Service would not consider this matter as part of the Industry Issue Resolution Program (IIRP), it would address it in a Generic Legal Advice Memorandum (GLAM) and it would work with NADA during this process (see first attachment). Unfortunately, the Service did not follow through with this commitment and has not, to date, issued any official industrywide guidance on this topic.

- Instead, the Service has issued, in piecemeal fashion, two nonprecedential documents that pertain to the application of the UNICAP rules to franchised dealers.

  - The first, TAM 200736026, was published in September 2007 and identifies several types of transactions that constitute production activity or resale activity (but not retail activity) and therefore require the dealer to capitalize direct and indirect costs associated with these activities.

  - The second, a memorandum from the HMT Industry Director entitled *Tier III – Field Directive on the Planning and Examination of IRC § 263A issues in the Auto Dealership Industry*, LMSB-4-0909-035 (see second attachment), was issued in September 2009 and (i) announces the suspension of new examinations of auto dealership 263A issues through December 31, 2010 to "allow taxpayers in the auto dealership industry an opportunity to voluntarily change their methods of accounting to comply with the legal reasoning outlined in TAM 200736026," and (ii) provides an "audit tool kit" with a computational spreadsheet and other items to assist revenue agents who conduct UNICAP examinations of auto dealerships. This document and its attachments, which were issued without any

[2] Four different IRS officials have occupied the HMT Industry Director or Acting Director position since NADA initiated discussions with the Service on this issue (Mr. Petrella, Mr. Singleton, Mr. Risacher, and the current director, Mr. Brantley). Consequently, this letter refers to the HMT Industry Director position and not the name of the official occupying it.

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opportunity for external review or comment, contain significant flaws that can lead to distortions of income.

- The application of UNICAP to auto dealers was placed on the 2007-08 Treasury-IRS Priority Guidance Plan (PGP)(producer issue only), the 2008-09 PGP (producer issue and issues pertaining to storage and handling costs), and the recently released 2009-10 PGP (revenue ruling on producer issue only). Unfortunately, dealer-taxpayers have not received industrywide guidance pursuant to any of these plans, and it now appears from the 2009-10 PGP that Treasury and the Service will confine any forthcoming industrywide guidance to the producer issue only (and, it is our understanding, this guidance likely will not provide any direction on the critical issue of what constitutes *de minimis* production activity under a facts and circumstances test).

- Dealers thus have been unable to secure comprehensive, industrywide UNICAP guidance through the IIR Program (two prior requests denied), the GLAM process (prior commitment not honored), or the PGP (now limited to the producer issue). Instead, as signaled by the September 2009 field directive, HMT has established TAM 200736026 as a compliance template for the entire industry even though technical advice memoranda, being limited to the facts and circumstances of the taxpayers to whom they apply, are not designed to be used as a basis for changing the accounting methods of 17,000 diverse businesses.[3]

Request for Relief

- Fortunately, there remains a viable mechanism for Treasury and the Service to issue comprehensive, industrywide UNICAP guidance that would benefit from external analysis. In IRS Notice 2009-25, the IRS invited public comment on "how certain business practices in the retail industry have changed since the promulgation of the uniform capitalization regulations under § 263A ... in the 1990s and whether certain definitions under the regulations should be modified in light of current business practices." NADA responded to the notice by submitting detailed comments on June 26, 2009 (see third and fourth attachments). This review, if broad enough to encompass the range of UNICAP issues confronting car and truck dealers, could ensure that the Treasury regulations implementing section 263A both properly reflect how Congress intended for 263A to apply to dealers and keep current with the existing business practices of the industry.

- From both a legal and policy perspective, this would be a far more appropriate process for revising current tax policy than through a field directive that (i) effectively directs taxpayers to change their accounting methods based on an incomplete, non-precedential technical advice memorandum, and (ii) was issued without public comment on the feasibility of the new policy, whether it is consistent with the Internal Revenue Code, and the considerable burden it would impose on dealer-taxpayers. This last point requires particular emphasis as dealers are ill-equipped to meet the cash flow requirements that would be triggered by adherence to the field directive in light of an economic environment that has resulted in severely depressed sales and continued difficulty accessing affordable credit that is needed to sustain their operations.

[3] In 2006, HMT clearly recognized the inadequacy of using a technical advice memorandum in this manner by committing to developing a GLAM at the same time that TAM 200736026 was being developed. HMT's approach at that time is consistent with the Office of Chief Counsel's subsequent issuance of Notice CC-2007-003 (2-9-2007), which stated in part: "Technical advice may not be used to provide legal advice intended to be generally applicable to an industry or a discrete class of taxpayers."

Please see the IRS CIRCULAR 230 DISCLOSURE on the bottom of page 4.

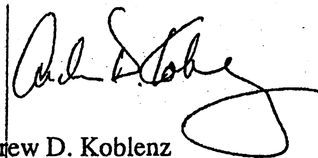
- Should Treasury and the Service decide to proceed with the rulemaking initiated in IRS Notice 2009-25, it is essential that the suspension of UNICAP examinations announced in the field directive be continued until the rulemaking process can be completed (which likely would occur after the current December 31, 2010 audit suspension date).

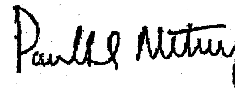
The foregoing provides a brief overview of a four year process that remains fragmented and unsettled for revenue agents and dealer taxpayers alike. Although we have discussed these issues with various Treasury and Service officials, we continuously receive the response that the current language in the Treasury regulations and the holdings of TAM 200736026 constrain their ability to address these matters differently. Consequently, we feel compelled to bring these matters to your attention with the hope that Treasury and the Service can adopt a procedurally valid approach that sensibly addresses the full range of UNICAP issues affecting franchised car and truck dealers.

We would appreciate the opportunity to meet with you to discuss the issues we have raised. If this can be arranged, please contact Paul Metrey, NADA Director, Regulatory Affairs at (703) 821-7040 or pmetrey@nada.org.

Thank you.

Sincerely,





Andrew D. Koblenz
Vice President & General Counsel

Paul D. Metrey
Director, Regulatory Affairs

Cc: IRS Director, Heavy Manufacturing and Transportation Industry
IRS Director, Field Operations (West), Heavy Manufacturing and Transportation Industry
IRS Motor Vehicle Technical Advisor
SBA Office of Advocacy

IRS CIRCULAR 230 DISCLOSURE: NADA does not provide legal or tax advice. Accordingly, any discussion of U.S. tax matters contained in this message, or in links from or attachments to this message, is not intended or written to be used, and cannot be used, in connection with the promotion, marketing or recommendation by anyone unaffiliated with NADA of any of the matters addressed herein or for the purpose of avoiding U.S. tax related penalties.

LIFO Lookout

DEALERS LOW ON NEW VEHICLE INVENTORY AT YEAR-END MAY FACE STIFF LIFO RESERVE RECAPTURE ... PLANNING MAY LESSEN THE BLOW

LIFO recapture consequences do not impact all dealers in the same way or to the same extent. Each dealer's LIFO layer history is unique or specific to that dealership. Think of a dealership's LIFO layer history as being similar to its DNA.

As a result, three factors will cause dealers on LIFO to be hit differently ... (1) the LIFO layer structure of their new vehicle inventory pools, (2) the amount of base-dollars in each layer and (3) the relative amount of LIFO reserve recapture potential that is embedded in each of the annual layers that has been built up over the years.

A dealer's base inventory and every annual increment has a different LIFO reserve payback potential ... even the different inventory pools (automobiles vs. light-duty trucks) have different payback potentials for each annual increment.

A further consequence is that when a LIFO layer is reduced at year-end and LIFO benefits are recaptured, that "lost" layer with its lower cost can never be re-established or replaced if the inventory level is restored to a more "normal" level ... which may be as early as the end of the next year.

There is much that can be done to make projections of LIFO reserve changes accurately, so that the real thought and effort can go into considering the alternatives. In addition, there are several planning alternatives (or strategies) that dealers should be considering. There is no "one-size-fits-all" remedy. The alternative or approach that is better for one dealer may not be the better alternative for another dealer.

Year-End Planning for LIFO Dealers

TABLE OF CONTENTS

FOR ARTICLE IN 2009 YEAR-END EDITION ... PAGES 22-47

- ***2009 ... For Some Dealers, the "Perfect Storm"*** ... 20
- ***Executive Summary ... Overview*** ... 22
- ***Executive Summary ... Step-by-Step Year-End Planning Procedures*** ... 23
- ***Recent IRS Pronouncements Affect Planning Alternatives***
  - Rev. Proc. 2008-23 ... "Vehicle-Pool" Method ... 21
  - CCM 200825044 ... IRS Guidance on Combining Pools & Problems Arising Thereunder ... 24
  - Rev. Proc. 2008-52 ... Restrictions Eased on Terminating LIFO Elections ... 25
  - ILM 200935024 ... Guidance on Section 481(a) Adjustment Spread Periods ... 26
- ***Inflation in 2009 Should Lessen Recapture of LIFO Reserves (Slightly)*** ... 26
- ***Living With ... and Planning for ... Uncertainty ... the Four Ds*** ... 26
- ***Determining the Projected LIFO Reserve Recapture at Year-End*** ... 27
  - Projecting the Payback Consequences ... 27
  - Decrement Carrybacks ... 28
  - Summary of Projection Case Studies ... 28
- ***What Can a Dealer Faced with Lower LIFO Inventories Do?*** ... 29
- ***Planning Strategies to Delay, Defer or Diffuse LIFO Recapture*** ... 29
  - Terminating ... Partial or Complete ... the LIFO Election for New Vehicles ... 30
  - Detail Analysis of ILM 200935024 ... 33
  - Changing to Split Up LIFO Pools, While Staying on LIFO ... 36
  - Extending LIFO Election to Used Vehicles ... 37
  - Changing to Adopt the IPIC (Inventory Price Index Computation) Method to Include Used Vehicles (and/or Parts & Accessories) in the Overall IPIC Pool ... 38
- ***Projection Case Studies***
  - *#1* ... Analysis of LIFO Reserve Recapture Rates ... 39-43
  - *#2* ... Determining the "Break-Even Point" for a LIFO Reserve ... 44-47

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ILM Questions & Answers

ILM 200935024

Chief Counsel Advice on the Acceleration of a Section 481(a) Adjustment

Section 481(a) - Accelerated Adjustment Not Required after Accounting Method Change

Situation Questions	*Answers & Comments*
Situation 1. If an automobile dealer that loses one of its five dealer franchises ("franchises") properly obtains automatic consent to terminate its election to use the LIFO method for the dollar-value pool that includes only the new vehicles sold under that lost franchise, must the taxpayer accelerate the corresponding Section 481(a) adjustment because its ending inventories for the year of change do not include any of those new vehicles?	***No...*** The automobile dealer must include only one-fourth of the Section 481(a) adjustment in the taxable income of each year of the four taxable years that begin with the year of change ("four-year adjustment period"). ***Comment:*** The fact pattern for Situations 1 & 2 appear on the facing page.
Situation 2. Is the answer in Situation 1 the same if the automobile dealer loses its only franchise but still operates the remaining portions of its trade or business?	***Yes...*** There is no acceleration of the Sec. 481(a) adjustment if the dealer continues to operate the remaining portions of its trade or business.
Situation 3. If the automobile dealer maintains one pool for all new vehicles, may the automobile dealer change from the LIFO method for only the vehicles sold under the lost franchise? ***Facts in Situation 3*** The facts in Situation 3 are the same as in Situation 1, except that effective for the taxable year ending December 31, 2007, the dealership had elected to use the Vehicle-Pool Method for all new vehicles. (Rev. Proc. 2008-23) On January 1, 2009, the LIFO reserve attributable to the single pool was $40x. If Taxpayer used its LIFO method for the taxable year ending December 31, 2009, the LIFO reserve would be reduced by $8x as a result of having no Pontiac vehicles in ending inventory.	***The automobile dealer may not change its method of accounting for some of the vehicles that are within the scope of a single dollar-value pool.*** However, the automobile dealer may either • Change from the LIFO method for its single dollar-value pool that includes all new vehicles (i.e., terminate its entire LIFO election), or • Change its dollar-value pooling method to a method of pooling based on vehicles sold under each franchise ***and*** change from the LIFO method for the dollar-value pool that includes only the vehicles sold under the lost franchise. ***Comments:*** • The two changes suggested in the second part above could not both be made as automatic changes, not requiring advance consent from the IRS. • The computation of the amount of the LIFO reserve attributable to the new vehicles related to the lost (Pontiac) franchise could be problematic. The amount is simply given as $8x, with no further explanation. (See Reg. Sec. 1.472-8(g)) • ***Query:*** Could the dealership change its pooling method to include "all new vehicles manufactured by the same ***manufacturer***," rather than by ***franchise***? In many cases, pooling by manufacturer would be broader than pooling by franchise, although there might be some tradeoffs.

Source: ILM 200935024 ... dated August 17, 2009 ... release date of August 28, 2009.
This Chief Counsel Advice responds to a request for technical assistance from the IRS Motor Vehicle Industry Counsel. It contains the following caveat: "This advice may not be used or cited as precedent."

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Executive Summary	***OVERVIEW OF LIFO PLANNING ARTICLE***
Inflation Will Help ... A Little	• For many automobile dealers, regardless of the cause of their anticipated lower ending inventories, LIFO recapture will be inevitable to some extent. • Inflation in 2009 will help offset some of the LIFO recapture due to the lower inventory levels. The net decrease in the LIFO reserve at year-end may be far lower than initially feared because of the combination of ... ◆ Inflation in the cost of vehicles in the ending inventory. ◆ The build-up of LIFO increments in more recent years (which have lesser payback potential when invaded by the carryback of the decrement in the current year) • These two factors are netted in arriving at the final amount of the LIFO reserve/change for the year.
Four Recent Developments Affect Planning Alternatives	• Introduction of the *"Vehicle-Pool"* Method (predicated on the use of one or both of the Alternative LIFO Methods) by Revenue Procedure 2008-23. ◆ When a dealer's LIFO pools for new automobiles and new light-duty trucks are combined, there may be a significant shifting of contributions to LIFO reserves. • Chief Counsel Memo (CCM) 200825044 provides guidance on the sequence of calculations to be followed in combining LIFO pools. ◆ First, combine the annual layers of the two LIFO pools into a single pool. ◆ Second, rebase the combined pool to 1.0000 as of the beginning of the year of change. ◆ The CCM contains this disclaimer ... "This advice may not be used or cited as precedent." • Termination of LIFO elections has been made easier under Revenue Procedure 2008-52 which contains updated procedures by which taxpayers may obtain automatic consent from the IRS for certain changes in methods of accounting. • ILM 200935024 provides guidance on the treatment of Section 481(a) adjustment spread periods in LIFO termination situations.
Coincidental Benefit from ILM	• The answer given by the IRS in the third question/issue in ILM 200935024 discusses an alternative two-step approach that may be very helpful in certain situations where a dealer has one franchise terminated, but still has one or more others. But, watch the timing of the filing of the Forms 3115 on this.
Planning Objectives... The 4 Ds	• Dealerships must ***determine*** the amount of LIFO recapture they are facing based on anticipated year-end inventory levels. The greater the degree of accuracy in the projections, the better. • After making this determination, planning strategies should address all of the alternatives or options that are reasonably available to ***delay, defer*** or ***diffuse*** the impact of the significant reductions in LIFO reserves to the greatest extent possible. • It is advisable to have a "game plan" or sense of the strategic changes that will be made before year-end.
Facing Page	• *Step-by-Step Planning Considerations for Year-End LIFO Inventories*
Most ... But not all ... Forms 3115 Can Be Filed with the IRS After Year-End	• There is no need to rush to judgment before year-end, because many of the changes in accounting method that will be employed to mitigate LIFO reserve recapture are accomplished by filing Form 3115 when the 2009 income tax return is filed. • ***One important exception ...*** Form 3115 to split the dealership's LIFO pools in order to terminate LIFO for a lost franchise, while retaining LIFO for remaining franchises, ***must be filed with the IRS before the end of the year (with the payment of a user fee).*** • ***You can allow yourself plenty of time for hindsight.*** If the filing date for the dealership's 2009 income tax return is extended, that extension of time will provide additional time in which to evaluate the situation for 2010. ◆ This could be particularly important for a dealer who has had a franchise terminated in 2009, but hopes to obtain another franchise in 2010. Obviously, the closer you get to the end of 2010, the more information you will have available.
Keep Your Options Open	• ***Conformity Requirement.*** If electing LIFO for used vehicles is an option, then the dealership must provide an estimate of the change/increase in the LIFO reserve for the used vehicle pool on all of the 2009 year-end financial statements to the manufacturer and to all other interested parties. • If changing to the IPIC LIFO method is an option, it may be necessary to use preliminary estimates of the inflation for the year because of Bureau of Labor Statistics delays in releasing the final PPI and CPI indexes after year-end.

Step-by-Step	PLANNING CONSIDERATIONS FOR YEAR-END LIFO INVENTORIES
Step #1	• ***Project the year-end LIFO reserve change, including proofs and reconciliations.*** • Be sure the projection includes in transit vehicles. • See Projection Case Studies on pages 38-47.
Step #2 ***Single, Combined LIFO Pool Possibility***	• If the dealership is still using separate pools for new automobiles and for new light-duty trucks, evaluate the results from combining the two pools into a single pool under the Vehicle-Pool Method (Rev. Proc. 2008-23). ◆ Advance permission from IRS is not required - this would be an automatic change in accounting method. • This change may be desirable ... even if there is some shifting of contribution to the LIFO reserve from LIFO layers for earlier years to the more recent (i.e., 2008-2007-2006) layers. • There are situations where the change would be detrimental unless the sequence of computations followed in combining the pools is to first rebase each pool to 1.000 as of the beginning of the year of change and then to combine the (rebased) pools.
Step #3 ***Evaluate Results***	• Discuss the results with the dealer. Are the results acceptable? • If the results are not acceptable, can some of the recapture be mitigated by increasing the level of year-end inventory? If yes, will the dealer actually be able to increase ending inventory (i.e., does the manufacturer have product)? If yes, is it economically feasible ... i.e., does it make sense to increase the ending inventory?
Step #4 ***Consider Terminating the LIFO Election***	• Generally, if the entire LIFO election is terminated, the dealer will be able to recapture the LIFO reserve in income over a 4-year spread period if the dealer continues its trade or business. • If the dealer's year-end inventories are significantly lower because a franchise was terminated, alternative situations and expectations to be taken into account include: ◆ Is the dealer going to stay in business (selling used vehicles and parts and providing repair and other services) or is the dealership being shut down entirely? ◆ How many other franchises does the dealer have to continue his/her business with ... one, two, or several? ◆ What are the dealer's profitability expectations for continuing the remaining franchises? ◆ Will the dealer be able to obtain another franchise ... or more franchises? • IRS guidance issued in ILM 200935024 should be considered as part of the overall LIFO termination evaluation. This deals with whether the 4-year spread period might be accelerated. • If the dealership has a franchise that is being wound down over a period extending into 2010, what can be done as far as planning for continuing or (partially) terminating the LIFO election in 2010?
Step #5 ***Consider Electing LIFO for Used Vehicles***	• If there is significant inflation in used vehicle inventories at year-end, electing LIFO for used vehicles may be strategically important, even though the dealership's new vehicle inventory levels are not projected to be significantly lower. • ***Income Statement Offset.*** The election of LIFO for used vehicles could create a significant deduction that would offset the income created by the recapture of LIFO reserve from the new vehicle inventory pool(s). • ***Inventory Writedowns.*** The beginning inventory in the year LIFO is elected must be stated at cost. Writedowns against the used vehicle inventory at the end of the year are not permitted. ◆ The extent of the dealership's writedowns as of the beginning of the year must be considered in connection with this requirement. Note that the dealership has already recorded in current year (2009) income 100% of the writedowns that were taken as of Dec. 31, 2008. Therefore, two-thirds of this writedown reversal can be deferred from 2009 and taken into income over 2 years.
Step #6 ***Consider Including More Inventory By Changing to the IPIC Method***	• Pooling variations under the IPIC method might permit combining all of the dealership's inventories (new vehicles, used vehicles and parts & accessories) into a broader, single pool. • Alternatively, perhaps only the used vehicles might be combined with the new vehicles. • The "writedown issue" will have to be addressed if a change to the IPIC method is made. • ***Computation Simplicity.*** The IPIC method eliminates the need for computation of detailed inflation indexes. • ***Inflation Rates.*** It is possible that the PPI or CPI category selected might show (somewhat) higher inflation for 2009 than the inflation rate that would otherwise be computed for certain manufacturers under the Alternative LIFO Methods for new and for used vehicles.
Step #7 ***Follow-up***	• After considering the above planning alternatives, make a best-efforts attempt to quantify the results under these different scenarios. • Depending on the strategy or combination of strategies selected, identify the reporting and/or filing requirements with the IRS to implement these changes. ◆ Forms 3115 for changes in LIFO methods ... automatic vs. advance permission required. ◆ Forms 970 if LIFO is being extended to used vehicle inventories or in certain IPIC (pool) changes.

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LTR 200930029	***TOOL REIMBURSEMENT PLAN APPROVED BY IRS*** Page 1 of 2
Summary	• In Private Letter Ruling 200930029, the ruled that the taxpayer's plan satisfies the business connection, substantiation and return of excess requirements of an accountable plan under Section 62(c). • All payments made under the plan in accordance with the terms of the plan will be excluded from the employee's income and will not be wages subject to the withholding and payment of employment taxes. • The IRS indicated that Revenue Ruling 2005-52 which addresses ***tool allowance*** arrangements is not relevant to its analysis of this taxpayer's ***expense reimbursement*** arrangement (which is basically a dollar-for-dollar reimbursement arrangement).
Facts	• The taxpayer in the LTR is expanding its professional consulting business to include a new division that both will sell professional tools and equipment and provide associated services, such as repair and maintenance, to its customer base. ◆ The taxpayer will employ service technicians (Technicians) as hourly wage employees to perform the repair and maintenance services on tools and equipment sold by the taxpayer to its customers. ◆ The taxpayer's Technicians are required to provide and maintain their own tools and equipment for performing the repair and maintenance work. ◆ The Technicians' tools and equipment, which are kept on-site at the taxpayer's business locations, are owned by them and are used exclusively to perform repair and maintenance work for the taxpayer. • The taxpayer will reimburse Technicians for certain deductible business expenses incurred in connection with supplies, tools, equipment, and training or certification necessary for Technicians to perform services for the taxpayer through an expense reimbursement arrangement (the plan). ◆ The plan is only between the taxpayer and the taxpayer's Technicians. ◆ The Plan only reimburses covered costs that the Technician substantiates to the taxpayer. • The reimbursements are not provided in lieu of, nor are they a function of, any other compensation such as hourly wages, fixed salaries, bonuses, benefits, or commissions. • The plan does not provide for any adjustments to compensation on account of reimbursements. • Tools and equipment required by Technicians to perform services for the taxpayer may range from simple hand tools to diagnostic equipment. • The plan will not reimburse expenses for supplies, tools, or equipment incurred while the Technician was employed by another employer or expenses for any supplies, tools, or equipment purchased prior to the plan start date. • Because the plan reimburses costs incurred to purchase tools and equipment eligible for a Section 179 deduction, the plan will not reimburse for any depreciation of such tools and equipment that might have been otherwise deductible under Section 167(a). • Redundant tool and equipment reimbursements are not permitted unless the redundant tools or equipment are required to perform assigned jobs or are required to replace lost or broken tools or equipment that have no associated warranty and/or timely replacement process available to facilitate the type of jobs assigned to the Technician. • The plan will not reimburse for the acquisition or use of cell phones or automobiles. • The taxpayer plans to distribute the approved vendor list to Technicians at the beginning of each plan year. • The plan contains other limitations and restrictions in addition to those included above.

TOOL REIMBURSEMENT PLAN APPROVED BY IRS

<table>
<tr><td>Business Connection Requirement</td><td>

- Based on the totality of the facts, the taxpayer's plan satisfies the business connection requirement of Reg. Sec. 1.62-2(d).
- Specifically, the facts and circumstances of the taxpayer's business and its plan, including the certifications required and the plan's Claim Form procedures, establish that the plan will reimburse only business expenses deductible under Section 162 or Section 179, and incurred, by Technicians in performing services for the taxpayer.
- For all tool and equipment expenses reimbursed under the plan, Technicians are required to certify on the Claim Form that the expenses incurred are necessary for the performance of services for the taxpayer, the tools and equipment are required to be kept on site, and all claimed expenses are verified as necessary for the performance of services for the taxpayer by the Technician's manager.
- For tool and equipment expenses reimbursed under the plan that are deductible under Section 179 to the Technician, a Technician is required to further certify that he could otherwise claim the cost of the tools and equipment as a deduction under Section 179(a).
  - Further, the Technician is required to certify that he will reduce the Section 179(b)(1) and (b)(2) limits for the taxable year by the amount of any reimbursement received under the plan for Section 179 property during that taxable year.
  - This will limit any deduction he or his spouse might claim under Section 179 for that taxable year if the Technician has other Section 179 property that is placed in service during that taxable year but not reimbursed under the Plan.
  - As a result of the Technician's certifications and the Plan's Claim Form procedures, the payment amount that the Technician receives as a reimbursement for expenses incurred in the purchase and placement in service of Section 179 property (e.g., certain tools and equipment) under the plan will be treated as an elected Section 179(a) deduction by the Technician.
- The payments will be made in addition to, rather than in lieu of, any other compensation such as hourly wages, fixed salaries, bonuses, benefits, or commissions.
  - As such, the payments will not be made to an employee regardless of whether the employee incurs (or is reasonably expected to incur) deductible business expenses or other bona fide expenses related to the employer's business.

</td></tr>
<tr><td>Substantiation Requirement</td><td>

- Under the plan, expenses will be reimbursed only if they would be deductible by Technicians under Section 162 or Section 179, as applicable, and substantiated either under Section 162 or Section 274(d), as applicable.
- For all expenses, Technicians are required to submit a Claim Form along with a receipt, invoice, or other written confirmation of proof of purchase that provides sufficient information for the taxpayer to determine that the expense was incurred in connection with services performed for taxpayer, specifically, the amount, the date, and the type of expense incurred.
- In addition, the plan will only reimburse expenses incurred to purchase tools and equipment that are used only for business purposes on the work site and are kept on the work site at all times.
  - This substantiation satisfies the requirements of Section 162.
  - For any computer or peripheral equipment subject to Section 274(d), this substantiation satisfies those requirements as well.
- Furthermore, the plan requires that expenses be substantiated within a reasonable period of time from the date the expense is incurred.

</td></tr>
<tr><td>Return of Excess Requirement</td><td>

- The plan will reimburse only properly substantiated expenses already incurred; it does not provide any allowances or cash advances for expenses.
- In addition, any reimbursement in error is required to be returned within a reasonable period of time.

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I. The State of Decline and Fall of the Automotive Industry (As We Once Knew It)

A. Chrysler files for protection under Chapter 11 of the U.S. Bankruptcy Code in the Southern District of New York ... April 30, 2009.

1. Follow-up on May 14 ... 789 Chrysler dealers received letters telling them that their franchises will be terminated.
2. This impacts Chrysler, Jeep, Dodge and Dodge Truck dealers.
3. Chrysler's bankruptcy took the form of a sale of Chrysler's major assets under Section 363 of the Bankruptcy Code and a liquidation of a remainder of the Company.
   a. In a "Section 363 sale," an outside entity acquires the assets (in this case, brand-related assets) and theoretically takes those assets free and clear of associated liabilities. This entity could be a pre-existing company (such as Fiat) or it could be a newly created company with the United Auto Workers and the U.S. government as its primary shareholders.
   b. Section 363 allows the Company to take a fast track to the sale without the due process protections usually provided to creditors.
4. See NADA web site (www.nada.org) for comprehensive information and a detailed timeline.

B. General Motors files for protection under Chapter 11 of the U.S. Bankruptcy Code in U.S. Bankruptcy Court in Manhattan (New York) ... June 1, 2009.

1. GM notifies 1,124 dealers that their franchises will not be renewed when they expire in October 2010.
   a. GM intends to eliminate all Pontiac, Saab, Saturn and Hummer dealers.
   b. In addition, GM intends to eliminate more than 1,000 Chevrolet, Cadillac, Buick and GMC dealers. These dealers have received what are called "Wind-Down Agreements."
2. Those Chevrolet, Cadillac, Buick and GMC dealers that General Motors has determined it will allow to continue in operation will receive what are labeled "Participation Agreements."
3. See NADA web site (www.nada.org) for comprehensive information and a detailed timeline.

C. Abolition of GM & Chrysler ... downsizing of all dealer networks

1. How is this affecting your overall dealership practice?
2. Floorplan "clawbacks" ... Impact on inventory levels
3. Single purpose real estate ... for dealers trying to exit the business ... huge losses

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I. ***The State of Decline and Fall of the Automotive Industry (As We Once Knew It) (continued...)***

D. Various bills introduced in Congress to soften harsh terms initially announced by Chrysler and GM for terminating dealerships ... Status of bills is uncertain.

E. Legislative initiatives to stimulate industry ... "Cash for Clunkers" (June 24, 2009)

   1. IRS MVTA *Automotive Alert* re: Taxability of "Cash for Clunkers" payments to dealerships was issued July 2009. ***[See Attachment #1]***

F. What does the industry decline portend for the future?

G. How does the industry decline impact prevailing tax practices?

   1. Concern (expressed by IRS Motor Vehicle Technical Advisor, Ms. Terri Harris) over "aggressive" tax positions and practices in 2008-2009 dealership income tax returns

H. Treatment of sales made by GM dealers under GM's "30-Day" return guarantee promotion

   1. If vehicles are sold for which the customer's/purchaser's "no questions asked" guaranteed return privilege extends beyond January 1, 2010, should these sales be treated as "completed transactions" with respect to 2009 (i.e., as of Dec. 31, 2009)?
   2. Although this may only be a timing difference (2009 vs. 2010), the impact on net income or loss, coupled with expanded carryback provisions for net operating losses need to be considered.
   3. Treatment for Generally Accepted Accounting Principles (GAAP may permit reliance on an estimate of returns) may be different from correct treatment for Federal income tax purposes.

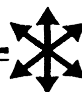
II. ***LIFO ... For Dealerships Staying on LIFO for 2009***

A. New Vehicle LIFO calculations

   1. For many dealerships, projected inventories at Dec. 31, 2009 are expected to be significantly lower than a year ago.
      a. In some instances, depending on inventory mix, inflation rate for the year may be considerable, and this may offset (to some extent) payback of LIFO reserves due to lower inventory levels and corresponding LIFO decrements.
   2. In 2008, many more dealers converted to the Vehicle-Pool (i.e., Single Pool) LIFO Method (Rev. Proc. 2008-23).
      a. Single Pool LIFO Method will simplify year-end projections for some dealerships.
      b. For dealerships still on LIFO at year-end, the opportunity to change to the Single Pool Method will still be available.

B. We are continuing to find surprising results buried in the LIFO calculations for some dealers converting to the Vehicle-Pool (i.e., single, combined pool) Method.

   1. Usually, the benefit from changing to the single pool results from being able to minimize or partially avoid the LIFO reserve recapture impact where there is a significant decrement in one of the two pools (or both pools) where the inventory levels have significantly declined.
   2. Generally, there is not much benefit resulting from the recomputed, weighted inflation rate for the single pool (as compared to the separate inflation rates calculated for each pool).
      a. However, in a few instances, there has been a significant increase in the LIFO reserve attributable to this factor alone.



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3. Another benefit (from changing to the Vehicle-Pool Method) may result from the shifting in contribution to the LIFO reserve among prior year layers as of the beginning of the year of change.
   a. This development has come about as a result of the issuance of guidance by the IRS on procedures for combining automobile and truck LIFO pools when the Vehicle-Pool Method is adopted.
4. Chief Counsel Memorandum (CCM) 200825044 (May 2008) ... what to do about it
   a. This CCM 200825044 provides guidance on procedures for combining automobile and truck LIFO pools.
      (1) Basically, CCM says sequence of calculations should be to first combine the two pools into a single pool and then to rebase the combined pool to 1.0000 as of the beginning of the year of change.
      (2) This guidance contains the qualifying disclaimer ... "This advice may not be used or cited as precedent."
      (3) CCM 200825044 provides two examples showing how to establish the year of change (which is 2008 in both examples) as the new base year for making the change to the single, combined pool method. These examples follow the format used for examples found in the LIFO Regulations.
   b. The 2008 Year-End Edition of the *LIFO Lookout* analyzed the CCM and these examples, and it examined some very interesting consequences and results if the sequence of operations were reversed. ***[See Attachment #2]***
   c. Three case studies are included in the 2009 Mid-Year Edition of the *LIFO Lookout* to show how much the contributions to the LIFO reserve have been shifted among LIFO layers (i.e., years having increments) when the combining process occurs.
   d. We have found that, depending on the facts and circumstances, these differences can be very significant, especially where (large) decrements are anticipated to be experienced in the pools in the year of change ... or, in fact, are experienced in the year of change. ***[See Attachment #3]***
   e. With some dealers on the verge of losing substantial portions of their inventories in 2009 and/or 2010 due to actions taken in manufacturer bankruptcies, the shifting of contributions to the LIFO reserve to the more recent years can take on added importance in situations where large decrements are experienced in the combined LIFO pool in the year of change or a succeeding year.

C. ***How does a dealer's loss of a franchise affect LIFO calculations?*** ILM 200935024 (dated August 17, 2009) provides a partial answer to this question by addressing three specific fact situations for which an examining agent requested guidance on how to handle Section 481(a) adjustments and LIFO terminations. *[This ILM is discussed separately in Section III of this outline.]*

D. Treatment of sales made by GM dealers under GM's "30-Day" return guarantee promotion
   1. If vehicles are sold for which the customer's/purchaser's "no questions asked" guaranteed return privilege extends beyond January 1, 2010, should these sales be treated as "completed transactions" with respect to 2009 (i.e., as of Dec. 31, 2009)?
      a. Accounting implications (reserve for returns on financial statements ... but how to quantify)

b. Tax implications (no reserves for returns for tax purposes ... Net Operating Loss carryback aspects)

E. Used Vehicle LIFO Calculations
1. Inflation anticipated for used vehicle inventories
2. Practicality of electing/re-electing LIFO for used vehicles ... Trade-off vs. year-end writedowns

III. LIFO ... Where Significant Reductions in Inventory Levels Are Expected at Year-End

A. Major causes of anticipated significant decreases in year-end inventory
1. Termination of the dealer's franchise(s) by the manufacturer due to bankruptcy/restructurings
2. Severe sell-off of new vehicle inventory due to "Cash for Clunkers" program in August 2009 with inability to replenish new vehicle inventory before year-end
3. Manufacturer inability to provide new vehicles due to production difficulties or other causes

B. Importance of year-end projections, especially if year-end inventory levels are expected to be lower.
1. Consider implications of changing to the Vehicle-Pool Method
2. Consider implications of CCM 200825044 (discussed previously in this outline)

C. Planning to mitigate loss of LIFO benefits ... Different dealership scenarios
1. ***Possibility #1.*** Dealership with multiple franchises, only one (or two) of which are being terminated.
   a. Discuss (1) benefit of dollar-value LIFO treating inventory as an investment of dollars ... (2) advantages of Alternative LIFO Method ... and (3) further benefit of electing to combine pools for new cars and trucks into a single pool under Rev. Proc. 2008-23.
   b. This is all very basic; but it's very important not to overlook planning opportunities here.
2. ***Possibility #2.*** Dealership with single franchise with is terminated (either directly or indirectly) by manufacturer bankruptcy ... stay in business just selling used cars
   (1) Discuss (1) possible acquisition of another new vehicle franchise ... (2) IPIC election to defer impact vs. immediate repayment of entire LIFO reserve for new vehicles
3. ***Other possibilities...***

D. ***How does a dealer's loss of a franchise affect LIFO calculations?*** ILM 200935024 (dated August 17, 2009) provides a partial answer to this question by addressing three specific fact situations for which an examining agent requested guidance on how to handle Section 481(a) adjustments and LIFO terminations. ***[See Attachment #4]***

IV. LIFO ... For Dealerships Terminating LIFO Elections

A. ***In general*** ... Termination of dealer LIFO elections for new vehicles
1. Many dealerships terminated their LIFO elections for 2008 hoping to spread the repayment of their entire LIFO reserve as of Dec. 31, 2007 over 4 years. This was done, rather than staying on LIFO for 2008 and facing a significant recapture of their LIFO reserve all in one year due to a significantly depressed inventory level as of Dec. 31, 2008.
   a. Importance of detail calculations
   b. Won't be able to re-elect LIFO for 5 years

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c. Likelihood of significant inflation in 2009-2010 (which would make staying on LIFO beneficial)

d. Far simpler now that uncertainties over "permitted methods" definitions have been eliminated by Rev. Proc. 2008-52

e. Change to terminate a LIFO election is an automatic change (advance consent from the IRS is not required).

B. ***Uncertainty re:*** ... Some prior LIFO election terminations by dealerships

1. What about Forms 3115 that were incorrectly filed as "automatic" LIFO terminations before Rev. Proc. 2008-52 relaxed the requirements?

   a. Unfortunately, there are still some dealers who used the wrong Form 3115 filing procedure in previously filing to "request permission" to terminate their LIFO elections.

   b. In other words, some dealers (CPAs?) thought they could use the automatic change filing procedure to terminate their LIFO elections before 2008, and they filed Form 3115 ***after*** the end of the year of change. As a result, they did not obtain permission from the IRS ***in advance*** to terminate their LIFO elections.

   c. Revenue Procedure 2008-52 does not say anything about whether these dealers are still on LIFO, or are off LIFO or whether they should re-file another Form 3115 under the current automatic provisions.

   d. If dealerships are supposed to re-file Form 3115, will the year of change/termination be retroactive to the year "intended" by the dealer? Or will the year of change be the later year for which the subsequent Form 3115 is timely filed? For dealers in this quandary, this limbo state is theoretically a mess.

C. ***Prospective LIFO terminations for 2009*** ... Special situations where terminating a LIFO election for new vehicle inventories warrants consideration

1. Involves some (Chrysler or General Motors) dealers who have received letters from Chrysler or General Motors telling them that their franchises will be terminated.

2. In some cases, the franchise being terminated is the only one the dealer has, and the dealer plans to stay in business selling used vehicles and providing other automotive-related services.

3. For these dealers whose new vehicle inventories will likely be zero - or negligible, if demonstrators are still around - at the end of the year, in certain cases, terminating the LIFO election (if the tax return has not already been filed) may be considered as a preemptive strike to delay the full impact of having to repay all of the LIFO reserve in a single year.

4. There may be other alternatives available to the dealership, and it is important to carefully consider the provisions in Section 5 of Rev. Proc. 2008-52.

   a. Section 5 of Rev. Proc. 2008-52 prescribes certain events and situations that will accelerate or shorten the period of time over which the Section 481(a) adjustment, ordinarily 4 years, may be spread. Be sure you read these provisions carefully.

5. ***How does a dealer's loss of a franchise affect LIFO calculations?*** ILM 200935024 (dated August 17, 2009) provides a partial answer to this question by addressing three specific fact situations for which an examining agent requested guidance on how to handle Section 481(a) adjustments and LIFO terminations. *[This ILM is discussed separately in Section III above.]*

V. ***LIFO ... How Much Longer Will It Be Around? ... Don't Count It Out Yet***

A. Will the use of the LIFO method be legislated out of existence by President Obama and/or Congressional legislation?

B. International Financial Reporting Standards (IFRS) ... Losing steam, or at least losing some momentum, as a force or catalyst for terminating LIFO elections by U.S. taxpayers

C. LIFO Coalition ... significant lobbying efforts to prevent loss of LIFO for U.S. taxpayers

D. Best thing a dealer can do right now to try to save LIFO is to write a letter to a member of the Senate Finance Committee. ***[See Attachment #5]***

VI. ***Section 263A Cost Capitalization Rules ... Application to Auto Dealerships***

- [Text Omitted] ... See pages 14-33 of this Edition of the *DTW*

VII. ***Employer Tool Reimbursement Plans***

- [Text Omitted] ... See pages 38-39 of this Edition of the *DTW*

VIII. ***Used Vehicle Writedowns***

- [Text Omitted] ... See *DTW* 2009 Mid-Year Edition, pages 38-40

IX. ***West Covina Motors, Inc.***

- [Text Omitted] ... See *DTW* 2009 Mid-Year Edition, pages 24-37

X. ***Depreciation of "Free Loaner" Vehicles***

- **[Text Omitted] ... See *DTW* 2009 Mid-Year Edition, pages 15-19**

XI. ***Transitional Tax Assistance (ARRA & WHBA)***

- [Text Omitted] ... See Watch Out Item #7 on page 7 of this Edition of the *DTW*

XII. ***Elimination of Trade Discounts & Certain Advertising Fees from Inventory Costs***

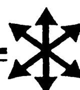
- [Text Omitted] ... This has been covered extensively in several prior issues of the *DTW*

XIII. ***Other Dealer Tax Practice Issues & Developments*** ... [Text Omitted]

XIV. ***Writing off Goodwill for Terminated Franchises***

- This is an expansion of material related to Section I ... See page 46 of this Edition of the *DTW*

Attachments referenced in this outline have been deleted. Certain portions of the outline have been omitted because they are discussed more fully in this Edition of the *Dealer Tax Watch* and/or the 2009 Mid-Year Edition of the *DTW*.



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XIV. *Writing Off Goodwill for Terminated Franchises*

A. In acquiring franchises, many dealers have paid specific amounts for the acquisition of a franchise. In other cases, they have paid more than dollar-for-dollar for the tangible assets in the business/franchise they acquired. As a result, they have capitalized on their books amounts paid for a franchise or payments referred to as "goodwill" that are associated with the acquisition of the franchise or a business.

B. During 2009, as well as in 2010, if a franchise is lost or terminated by the manufacturer, it may be appropriate for the dealer to take an income tax deduction for the unamortized amount of goodwill on the books.

C. If the franchise, or certain other intangible rights, were acquired before August 10, 1993, they may have been amortized over a fairly short number of years.

1. However, if the franchise were acquired after that date, Code Section 197 prescribes specific rules for amortizing the cost of those intangibles - including goodwill and covenants not to compete - over 15 years.
2. Section 197 also includes rules for determining whether or not the unamortized cost associated with the franchise is permitted to be written off for tax purposes if the franchise is lost.

D. The timing or the year of the deduction for the write-off for goodwill may be altered by announcements in December 2009 by Chrysler and General Motors.

1. Chrysler announced that it has unilaterally established a binding independent review process for rejected dealers, and
2. General Motors announced that it has established a binding arbitration process for wind-down dealers.
3. Some dealers may have to postpone their write-offs until the negotiation process they will be going through has been finalized. Possibly, some dealers will be fortunate enough not to have any write-off because, upon review, they will be entitled to retain their franchise after all.

E. ***Rules for writing off losses***

1. Generally, if a dealer has paid for goodwill in the acquisition of a single franchise, the unamortized amount of the goodwill would be deductible when the dealer loses his franchise.
2. If a dealer has acquired more than one franchise in a single transaction, and paid for goodwill in connection with acquiring those franchises, if the dealer loses, or incurs, the termination of one of those franchises, Section 197 does not permit a deduction for any unamortized goodwill (as of the date of the termination) if the other franchise (or franchises) are still retained.
   a. Section 197(f)(1)(A)(i) contains this provision.
   b. Section 197(f)(1)(A)(ii) provides that the taxpayer shall make appropriate adjustments to the adjusted tax basis of the retained intangibles (i.e., the other franchises) for any loss that is not recognized on the franchise that was terminated or lost.

F. Intangibles subject to the provisions of Section 197 (i.e., amortizable Section 197 intangibles) include...

1. Any franchise, trademark or trade name
2. Goodwill

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3. Going-concern value
4. Workforce in place
5. Business books and records, operating systems, or any other information base (including lists or other information with respect to current or prospective customers)
6. Any patent, copyright, formula, process, design, pattern, know-how, format, or other similar item
7. Any customer-based intangible
8. Any supplier-based intangible
9. Any license, permit or other right granted by a governmental unit or an agency
10. Any covenant not to compete ... or other arrangement to the extent such arrangement has substantially the same effect as a covenant not to compete ... entered into in connection with the direct or indirect acquisition of an interest in a trade or business

G. ***Gains on dispositions.*** Revenue Ruling 2007-37 addresses the tax treatment of the resulting gain in connection with the receipt of a payment (or payments) for the cancellation of a distributor agreement between a manufacturer and a distributor of the manufacturer's products.

1. Generally, when a dealer receives a cancellation payment from the distributor, the dealer would prefer to treat the gain inherent in the payment as long-term capital gain, rather than as ordinary income.
2. This Ruling shows that various sections of the Code could operate to treat portions of that gain as ordinary income.
   a. The Ruling does not state whether the distributor ("A") is operating as a C Corp. or an S Corp.
   b. The words "auto dealer" or "retailer" or "auto dealership" may be substituted for the words "distributor" and "distributorship" in the Ruling.
   c. The holding of the Ruling would clearly apply to situations such as those created when General Motors decided it would no longer produce Oldsmobiles.
3. Five years ago, at NADA's request, the IRS partially addressed this subject by issuing Private Letter Ruling 200218034. In this PLR/LTR, the taxpayer/dealer was an S Corporation. See *Dealer Tax Watch*, March 2002, pages 12-21.
   a. The cancellation of a distributor agreement between a manufacturer and a distributor of the manufacturer's products is a sale or exchange of property ... ***if*** the distributor has made a substantial capital investment in the distributorship ***and*** the investment is reflected in physical assets (i.e., such as inventory).
   b. Any resulting gain to the distributor is capital gain ... ***if*** the agreement is a capital asset.
4. The gain is Section 1231 gain and may be treated as capital gain if the agreement is property of a character subject to the allowance for depreciation under Section 167.
5. For this purpose, property is treated as being of such a character if it is amortizable under Section 197 or Section 1253.
6. The Section 1231 gain may be subject to recapture under Section 1245.
7. What Rev. Rul. 2007-37 discusses in detail - and what PLR 200218034 did not discuss - is the possibility that a significant amount of the gain that would otherwise be treated as long-term capital gain may be treated instead (either entirely or partially) as ordinary income.

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A Periodic Update of LIFO - News, Views and Ideas

LIFO LOOKOUT

Volume 19, Number 2 Publisher: Willard J. De Filipps, C.P.A. Year-End 2009

LIFO UPDATE

If you had called me personally to ask "What's happening lately with LIFO that I need to know about?"... Here's what I'd say:

#1. WILL LIFO BE AROUND NEXT YEAR? Yes. Almost everyone (including me) seems to believe that LIFO will still be around for at least one more year (2010) and possibly even two or three (2010-2011-2012).

But after that, it's anyone's guess even though the President's "Green Book" suggested a little more life, plus a fairly generous (8-year) period for the repayment of LIFO reserves.

However, many things could happen to alter LIFO's life expectancy - either prematurely shortening it or granting it a new lease on life. That leads to one of the most critical questions facing dealers on LIFO right now ...

#2. WHAT'S GOING TO HAPPEN TO DEALERS' LIFO RESERVES AT THE END OF THIS YEAR? ... Especially if they've lost a franchise or two ... or just simply can't get any more inventory? First, the good news. We are expecting some inflation to be present in inventories at year-end, and this will help to increase an automobile dealer's LIFO reserve.

Next, the bad news. . Unfortunately, in many instances, that positive result will be more than offset by the recapture of LIFO reserves due to the anticipated significantly lower year-end inventory levels.

With all that's happened during 2009 ... the fallout from the bankruptcy of General Motors and Chrysler and the severe impact that the Cash for Clunkers program had on depleting dealers' inventories ... most dealers are looking at the prospect of significantly lower new vehicle inventories at year-end.

Some dealers fortunate enough not to have received a franchise termination letter are anticipating year-end inventory levels that are 30-40-50%, or more, lower than last year. For a dealer who is able to buy more inventory before year-end, there may be barriers to doing so because of floorplan / credit limitations and the other additional costs of carrying that inventory.

LOOKOUT LOOKS INTO

LIFO Update 1

Year-End Alert
- Detailed Index for Conformity & Projections 5
- LIFO Conformity Reporting Requirements 5
- Year-End Projections for Planning Purposes (in "Good" Years) 14

Dealers Low on New Vehicle Inventory at Year-End May Face Stiff LIFO Reserve Recapture ... Planning May Lessen the Blow 20
- Detail Index for Planning (in "Tough" Years) 21
- IRS Guidance on LIFO Termination Sec. 481(a) Adjustment Spread Periods 33
- Projection Case Studies
  - Analysis of LIFO Reserve Recapture Rates 39
  - "Break-Even" Point for a LIFO Reserve...... 44

Quick Year-End Inflation Estimates for Auto Dealers
- Year-End Projections for Dealers Based on "One-of-Each" Mix Assumption 48
- Summary of Indexes & Charts 49
- Sample Letter for Year-End Projections 53
- *Detail By Make* for Year-End Estimates 2009-2010 New Vehicle Inflation Survey Assuming Ending Inventory Mix of One-of-Each Item Category 54

Sample Form 3115 Narrative Statement for 2009 Change to the Vehicle-Pool Method 62

In other cases, there simply isn't any inventory out there for a dealer to "get." The manufacturers don't have it, or they have it, but won't allocate it.

Bottom line ... Many dealers who are running low on inventory face stiff recapture of their LIFO reserve if they cannot "get" inventory by the end of the year.

So, the ***number one tax concern*** for many dealers right now is not one that the IRS is stirring up (like it has with its recent Directive on applying Section 263A inventory cost capitalization rules to dealerships). These dealers face the double whammy of (1) reduced sales and profits while fixed costs

see LIFO UPDATE, page 2

The *De Filipps' Dealer Tax Watch* newsletter is a periodic publication of essential tax information by Willard J. De Filipps, CPA, P.C., 317 West Prospect Avenue, Mt. Prospect, IL 60056. It is intended to provide accurate, general information on tax matters and it should not be construed as offering accounting or legal advice or accounting or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. Readers should consult their certified public accountant, attorney and/or other competent advisors to discuss their own situations and specific income, gift and estate tax questions. Mechanical or electronic reproduction or photocopying is prohibited without permission of the publisher. Annual subscription and back issues available ... See www.defilipps.com for details. Not assignable without consent. Any quoted material must be attributed to *De Filipps' Dealer Tax Watch* published by Willard J. De Filipps, CPA, P.C. Editorial comments and article suggestions are welcome and should be directed to Willard J. De Filipps at (847) 577-3977; FAX (847) 577-1073 or by email to cpawjd@aol.com. © Copyright 2009 Willard J. De Filipps.
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