



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

OFFICE OF THE CHIEF COUNSEL

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The Honorable Mike Pompeo  
U.S. House of Representatives  
Washington, DC 20515

Attention:

Dear Mr. Pompeo:

I am responding to a request from your staff dated February 16, 2012, that asked whether a landowner is allowed a deduction for the loss of wind development rights. The loss of wind development rights at issue resulted from a moratorium on new commercial wind power development in the \_\_\_\_\_ area that Governor \_\_\_\_\_ announced last year. The information your staff provided stated that the moratorium is voluntary, not legally binding, and for an indefinite time. The utility companies have agreed to respect the boundaries to which the moratorium applies.

A taxpayer can deduct any loss that insurance or other method does not compensate (section 165(a) of the Internal Revenue Code (the Code)). The taxpayer must incur the loss as a result of closed and completed transactions that are fixed by identifiable events, and except for a special rule for disaster losses that is not relevant here, actually sustained during the taxable year (section 1.165-1(b) of the Income Tax Regulations (the Regulations)). For individuals, a deduction under section 165(a) of the Code is limited to:

- Losses incurred in a trade or business
- Losses incurred in any transaction entered into for profit (though not connected with a trade or business)
- Losses of property not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft (section 165(c) and 165(h) of the Code).

A mere shrinkage in the value of an asset prior to a closed and completed transaction

does not give rise to a deductible loss (*Louisiana Land and Exploration Co. v. Commissioner*, 161 F.2d 842 (5<sup>th</sup> Cir. 1947), *affg.* 7 T.C. 507 (1946); *Price v. U.S.*, 260 F.Supp. 18 (W.D.Okla. 1966); *Appeal of Champlin*, 1 B.T.A. 1255 (1925)). Therefore, a landowner in fee simple cannot take a loss deduction for the shrinkage in value of each separate interest in the land. For example, if a landowner purchases land with expected mineral interests and the mineral interests prove to be non-existent, the landowner cannot take a loss deduction for cost of the land allocable to the mineral interest. The owner of a fee simple interest can only take a deduction on a closed and completed transaction such as the sale of the entire interest in the land.

A taxpayer may be able to deduct a loss incurred in a business and arising from the sudden termination of the usefulness in such business of nondepreciable property, where the taxpayer has permanently discarded the property from use, in the taxable year in which he or she sustained the loss (section 1.165-2 of the Regulations). If the taxpayer claims a loss on the basis of abandonment, the taxpayer must show (1) an intent to abandon property and (2) an overt act of abandonment (*Massey-Ferguson, Inc. v. Commissioner*, 59 T.C. 220 (1972)). For example, in the case of an oil lease, a taxpayer does not sustain a loss prior to the cancellation or termination of the lease unless a definite abandonment has occurred (*Davis v. Commissioner*, 241 F. 2d 701 (1957)). Whether property actually did lose its useful value in a particular year and whether the owner actually did abandon it as an asset during that year are questions of fact determined by considering all the surrounding facts and circumstances.

Issuing the moratorium itself would not entitle the landowner to an abandonment loss. The landowner would need to show an overt act of abandonment. Moreover, we are not clear that issuing the moratorium is an identifiable event that evidences worthlessness for the landowner to claim a loss deduction.

This letter calls your attention to certain general principles of the law for informational purposes only. It does not constitute a ruling (section 2.04 of Revenue Procedure 2012-1, 2012-1 I.R.B. 1, 7). A taxpayer can obtain advice on a specific set of facts by requesting a private letter ruling. The procedures for requesting a private letter ruling are in Revenue Procedure 2012-1. In addition, Revenue Procedure 2012-1 requires taxpayers to submit a user fee along with a private letter ruling request.

I hope this information is helpful. If you need further assistance, please call me or  
at .

Sincerely,

Thomas D. Moffitt  
Chief, Branch 2  
Associate Chief Counsel  
(Income Tax & Accounting)