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## COMMENT

### CORE DEPOSIT BASE: GOODWILL OR NOT GOODWILL — IS THAT THE QUESTION?

The term “core deposits” is used in the banking industry to refer to a bank’s gross or total dollar value of deposits; the term generally refers to the bank’s savings, checking, and time deposit accounts.<sup>1</sup> Core deposits are of particular importance to banks because they provide a low cost source of funds.<sup>2</sup> Depositors invest their funds in banks, typically earning five to six percent on their savings deposits, with a slightly higher rate of return on time deposit accounts such as certificates of deposit.<sup>3</sup> Banks, by aggregating the relatively small account balances of individual depositors, can invest in assets that earn a substantially higher rate of return than those available to individual depositors.

The interest rate spread between a bank’s costs and its potential earnings on these deposits is the basis for calculating a bank’s “core deposit base.”<sup>4</sup> More precisely, the core deposit base is an intangible asset on a bank’s balance sheet equal to the present value of the future net income stream generated by a bank’s acquired core deposits.<sup>5</sup> Theoretically, when a bank is

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1. See *AmSouth Bancorp. v. United States*, 681 F. Supp. 698, 699 (N.D. Ala. 1988); *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 465 (1988), *aff’d without opinion*, 900 F.2d 266 (11th Cir. 1990); *Banc One Corp. v. Commissioner*, 84 T.C. 476, 490 (1985), *aff’d*, 815 F.2d 75 (6th Cir. 1987). Time deposit accounts are funds placed with the bank and payable after a specified number of days or after a specified notice period. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2395 (1981). Banks will pay a slightly higher interest rate on these deposits in return for the depositor’s promise to keep the funds deposited for a specified time period.

2. *AmSouth*, 681 F. Supp. at 705; *Citizens & Southern*, 91 T.C. at 465-66; *Banc One*, 84 T.C. at 490; *Midlantic Nat’l Bank v. Commissioner*, 46 T.C.M. (CCH) 1464, 1465-66 (1983).

3. See *AmSouth*, 681 F. Supp. at 699, 705; *Citizens & Southern*, 91 T.C. at 465-66.

4. *AmSouth*, 681 F. Supp. at 705-06. Core deposits represent a liability to the banks. Customers deposit their funds into a bank, and the bank’s cash is increased along with the bank’s corresponding liability to repay the customers when requested. When the word “base” is attached to the term “core deposit” (core deposit base), that term represents, and will be used throughout this Comment to represent, the intangible asset equal to the present value of the future net income stream generated by the acquired core deposits. See *id.* at 699 n.3; *Citizens & Southern*, 91 T.C. at 465-66. In addition, this Comment uses the terms “deposit base,” “deposit base intangible,” and “core deposit intangible” interchangeably to refer to this intangible asset.

5. *Citizens & Southern*, 91 T.C. at 465.

acquired, the purchaser determines the fair market value of the bank's assets. The total of the fair market value of the individual assets, less the amount of any liabilities assumed, constitutes the price the purchaser is willing to pay for the bank. In addition, the purchaser normally pays a premium above the total net asset value of the bank, under the premise that the value of the assets together is worth more than the total of the values of the individual assets. Accountants describe this additional premium as goodwill or going concern value.<sup>6</sup>

A problem arises when a purchaser acquires a bank and allocates the purchase price among the assets in the underlying business. Section 167 of the Internal Revenue Code (the Code) sets forth the rules for obtaining a depreciation deduction: a deduction for the exhaustion and wear and tear of certain property used in a trade or business or held for the production of income.<sup>7</sup> Amortization is the depreciation equivalent for intangible assets.<sup>8</sup> The Treasury regulations for section 167 permit a depreciation deduction for an intangible asset if the asset is known to be of use in the business for a limited period of time.<sup>9</sup> The regulations, however, do not permit a deprecia-

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6. Goodwill is defined as the:

excess of cost of an acquired firm or operating unit over the current or fair market value of [the] net assets of the acquired unit. [It is] [i]nformally used to indicate the value of good customer relations, high employee morale, [and] a well-respected business name . . . which are expected to result in greater than normal earning power.

BLACK'S LAW DICTIONARY 625 (5th ed. 1979). The phrase "going concern value" is defined as the "value of the assets of a business as a going, active concern, rather than merely as items of property[,] which would be the case in a liquidation sale. Such value includes goodwill." *Id.* at 622.

7. Section 167 of the Internal Revenue Code provides: "(a) General rule.—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) — (1) of property used in the trade or business, or (2) of property held for the production of income." I.R.C. § 167(a) (West. Supp. 1990).

8. Amortization is the term used to describe the periodic charge-off of a portion of an intangible asset against income. BLACK'S LAW DICTIONARY 76 (5th ed. 1979). Depreciation is the term used to describe the periodic charge-off of a portion of a tangible asset. *Id.* at 397. While the term "depreciation" may refer to the exhaustion of an intangible asset, the technically correct term with respect to intangible assets is amortization. For ease of reference, however, this Comment will use the terms interchangeably.

9. Treas. Reg. § 1.167(a)-3 (as amended in 1960). The full text provides:

If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill.

*Id.*

tion deduction for goodwill.<sup>10</sup> Therefore, if the acquiring bank allocates a portion of its purchase price to the core deposit base in lieu of goodwill, the bank may identify an asset for which it can take a depreciation deduction, thereby reducing its taxable income and tax liability. Courts are reluctant, however, to recognize this allocation for tax purposes.<sup>11</sup>

Prior to 1988, several courts addressed the issue of amortization of an acquired core deposit base, denying amortization on every occasion.<sup>12</sup> The 1988 Tax Court decision of *Citizens & Southern Corp. v. Commissioner* provided the banks with their first major victory.<sup>13</sup> In *Citizens & Southern*, the bank's experts prepared voluminous and detailed reports, which estimated the value of the core deposit base.<sup>14</sup> Relying on these reports, the Tax Court permitted *Citizens & Southern* to take a depreciation deduction for the acquired core deposit base.<sup>15</sup> In addition, post acquisition data that corroborated the expert's valuation of the deposit base was influential in the court's holding.<sup>16</sup> Yet, despite the favorable ruling, the *Citizens & Southern* court, as well as other courts, did not emphasize what at least one commentator considers the crucial issue: Whether the core deposit base is an intangible asset separate and distinct from goodwill as a matter of law.<sup>17</sup>

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10. *Id.*

11. *See, e.g., AmSouth*, 681 F. Supp. at 719 ("The court ultimately finds and concludes . . . that [the] plaintiff has not met its burden of proving that the customer deposit base had a value which was separate and distinct from the goodwill [of the acquired bank] . . ."); *Banc One*, 84 T.C. at 502 n.6 (holding that, based upon the record, the taxpayer was not entitled to depreciate any acquired core deposit intangible); *cf. Citizens & Southern*, 91 T.C. at 514 ("We conclude that petitioner's tax method of depreciating [the] deposit base results in a fair allocation of the basis of the asset to periods in which benefit is realized and provides petitioner a reasonable allowance for depreciation.").

12. *See, e.g., Southern Bancorp. v. United States*, 732 F.2d 374, 376 n.2, 377 (4th Cir. 1984) (petitioner not permitted to amortize a portion of the purchase price premium allocated to loan portfolios because petitioner conducted the allocation "post hoc," and the court refused to address the issue of deposit base amortization because petitioner failed to raise the issue at trial), *cert. denied*, 469 U.S. 1207 (1985); *AmSouth*, 681 F. Supp. at 714, 719 (although petitioner failed to establish that the intangible was separate and distinct from goodwill, the court conceded that the deposit base may have a limited useful life); *Banc One*, 84 T.C. at 498 (petitioner failed to sustain his burden of proof with respect to the allocation of a portion of the purchase price to the core deposit base); *cf. Midlantic Nat'l Bank*, 46 T.C.M. (CCH) at 1475 (petitioner permitted to amortize the solicitation right, an asset analogous to the core deposit base, acquired when petitioner purchased a bank that had failed).

13. *Citizens & Southern*, 91 T.C. at 514 (Tax Court allowed bank to take depreciation deduction for acquired core deposit base).

14. *Id.* at 469-73.

15. *Id.* at 467-73, 514.

16. *Id.* at 473-79, 501-03, 514.

17. *See Blasi, Banks Win Major Victory on Core Deposit Amortization, but the Battle Continues*, J. BANK TAX'N 5, 7 (Winter 1989) ("Whether goodwill exists is a factual issue: however, what is goodwill should be a legal matter. . . . By failing to directly resolve the legal issue

This Comment addresses the issue of whether the deposit base is an intangible asset separate and distinct from goodwill. This Comment explains why the *Citizens & Southern* court's decision not to emphasize the separate and distinct requirement, but rather to focus on determining whether the core deposit base has a limited useful life, was correct. The Comment first sets forth the applicable Internal Revenue Code section, which outlines the rules regarding depreciation, and then synthesizes the Internal Revenue Service's position on the depreciation of the core deposit intangible, as explained in the Treasury regulations and revenue rulings. Second, this Comment reviews the case law supplementing the depreciation and amortization code provisions as it relates to the core deposit intangible and emphasizes the Tax Court's latest decision in *Citizens & Southern*. The Comment then examines the two elements required by the courts for the amortization of an intangible asset: the separate and distinct requirement and the limited useful life requirement. In addition, this Comment briefly compares the deposit base intangible to other amortizable intangible assets to support amortization of the core deposit base. Lastly, this Comment discusses why, based upon the policy behind the depreciation deduction, courts should focus more heavily on the proof requirement for establishing a limited useful life for the deposit base and should focus less on the separate and distinct requirement.

## I. THE FOUNDATION UPON WHICH THE DEPRECIATION DEDUCTION IS BUILT

### A. *Internal Revenue Code Section 167*

"The Internal Revenue Code's general section allowing taxpayers to depreciate certain property seems, at least at first blush, to be the essence of simplicity . . . ."<sup>18</sup> A quick reading of the depreciation provision<sup>19</sup> tends to support such a statement. The Code provides an allowance in the nature of a deduction, called depreciation, for the decline in value of property used in a trade or business or held for the production of income.<sup>20</sup> Property includes both tangible property,<sup>21</sup> such as buildings and machinery, and intan-

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of whether the core deposit intangible is goodwill, the Court has perpetuated the judicial controversy." (footnote omitted).

18. *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1243 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974).

19. I.R.C. § 167(a) (West Supp. 1990); *see also supra* note 7.

20. I.R.C. § 167(a) (West Supp. 1990); *see also supra* note 7.

21. *See* Treas. Reg. § 1.167(a)-2 (as amended in 1960) ("[T]he depreciation allowance in the case of tangible property applies only to that part of the property which is subject to wear and tear, . . . and to obsolescence.").

gible property,<sup>22</sup> such as patents and copyrights.<sup>23</sup> The Code, therefore, sets a very broad test for depreciability: Whether the property is used in a trade or business or is held for the production of income; and whether the property will deteriorate and become obsolete.<sup>24</sup> The apparent "simplicity" of the general Code provision, however, dissipates when one considers the regulations promulgated by the Secretary of the Treasury interpreting section 167.

### B. *The Internal Revenue Service's Interpretation of Section 167*

The Internal Revenue Code delegates to the Secretary of the Treasury general authority to prescribe the rules and regulations necessary for enforcement of the provisions of the Code.<sup>25</sup> The Internal Revenue Service (Service), a division of the Treasury Department, is the administrative agency that carries out the function of promulgating these regulations.<sup>26</sup> Section 1.167 of the Treasury regulations interprets Code section 167 and states the Service's definition of the basic factors determinative of a depreciation deduction, such as "reasonable allowance"<sup>27</sup> and "useful life,"<sup>28</sup> for both tangible<sup>29</sup> and intangible<sup>30</sup> assets.

#### 1. *Tangible and Intangible Property Generally Defined*

The depreciation allowance for tangible property is more easily recognized than the depreciation allowance for intangible property because of the difference in the nature of the assets. Tangible property, such as machinery and

22. Treas. Reg. § 1.167(a)-3 (as amended in 1960); *see also supra* note 9.

23. Treas. Reg. § 1.167(a)-3 (as amended in 1960); *see also supra* note 9.

24. The theory behind permitting a deduction for obsolescence ratably over the asset's life is based upon the accounting principle known as matching. The matching principle requires, to more accurately reflect the "true" net income from a particular asset, that expenses relating to an asset be permitted as a deduction in the year in which the expenses produce the income. G. WELSCH, C. ZLATKOVICH, & J. WHITE, *INTERMEDIATE ACCOUNTING* 15 (rev. ed. 1968). Therefore, through timing devices, such as capitalization and depreciation, items of income and expense are properly "matched." *See id.*

25. I.R.C. § 7805(a) (West Supp. 1990).

26. *See* I.R.C. § 7802 (West Supp. 1990); [1990] 12 Stand. Fed. Tax Rep. (CCH) ¶ 44,266.01.

27. *See* Treas. Reg. § 1.167(a)-1(a) (as amended in 1972) (stating that the amount allowed as a depreciation deduction should be part of a consistent plan whereby at the end of the asset's useful life the amounts set aside each year will equal the total cost of such asset).

28. *See id.* § 1.167(a)-1(b). Useful life is determined not with respect to the life of the asset in general, but with respect to the useful life of the asset in the taxpayer's trade or business. The taxpayer may refer to its own experiences with similar property, or to the experiences of the industry if the taxpayer's own experiences are inadequate, to determine the asset's useful life. *Id.*

29. Treas. Reg. § 1.167(a)-2 (as amended in 1960).

30. *Id.* § 1.167(a)-3; *see also supra* note 9.

buildings, physically deteriorates, and the taxpayer can easily quantify this decrease in value by physically observing the property. Intangible property, however, cannot be physically inspected, making a determination of any decrease in the asset's value difficult.<sup>31</sup>

With respect to intangible assets, the regulations provide that a depreciation deduction will be allowed if it is known from experience that the taxpayer will use the asset in the business for only a limited period of time.<sup>32</sup> Furthermore, the limited time must be measurable with reasonable accuracy.<sup>33</sup> The regulations include patents and copyrights as specific examples of intangible property with limited useful lives measurable with reasonable accuracy.<sup>34</sup> In contrast, the regulations prohibit a depreciation deduction for any intangible asset where the basis for the asset's limited useful life is merely the unsupported opinion of the taxpayer.<sup>35</sup>

## 2. *Why Goodwill is Per Se Nondepreciable*

Based upon the requirement that the intangible asset must have a limited useful life, the regulations also provide that "[n]o deduction for depreciation is allowable with respect to goodwill."<sup>36</sup> The case law is well settled on this point.<sup>37</sup> The value built up in a business through customer relations, operating efficiency, business name, and other attributes of goodwill will remain with the business as long as the taxpayer operates it as a unit. Even if a taxpayer can prove that the goodwill built up in his business will decline in value or "waste away," the taxpayer will still find it difficult to demonstrate a "limited" useful life with sufficient accuracy to sustain a depreciation deduction.<sup>38</sup> Therefore, the Service has developed a test, adopted by most courts, with respect to the amortization of intangibles: Where the asset is characterized as being in the nature of goodwill, the asset does not have a

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31. With regard to real property, the asset's value generally increases over time, especially during highly inflationary periods. Despite the economic reality that the asset is likely not to depreciate in value, the Code still permits a depreciation deduction. Because of the amorphous characteristics surrounding most intangible assets, particularly the core deposit base, courts have trouble quantifying a limited useful life for the intangible asset. For this reason, courts often conclude that the asset is nonamortizable.

32. Treas. Reg. § 1.167(a)-3 (as amended in 1960); *see also supra* note 9.

33. Treas. Reg. § 1.167(a)-3 (as amended in 1960).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Computing & Software, Inc. v. Commissioner*, 64 T.C. 223, 232 n.7 (1975) (citing *Winn-Dixie Montgomery, Inc. v. United States*, 444 F.2d 677, 685-686 (5th Cir. 1971); *Marsh & McLennan, Inc. v. Commissioner*, 420 F.2d 667, 668 (3d Cir. 1969), *aff'g* 51 T.C. 56 (1968); *United States v. Cornish*, 348 F.2d 175, 185 (9th Cir. 1965)).

38. The difficulty arises because the taxpayer must predict when his business will cease to exist in order to demonstrate the limits of the life of the goodwill.

limited useful life that can be measured with reasonable accuracy, and the depreciation deduction should be disallowed.<sup>39</sup> The burden falls on the taxpayer to support a claim that the asset has a limited useful life.<sup>40</sup> In effect, the taxpayer must argue that the asset is separate and distinct from goodwill before a depreciation deduction will be permitted.<sup>41</sup> The question is: How separate and distinct must the asset be from goodwill? Subscription and customer lists are intangible assets with similar characteristics to the core deposit base,<sup>42</sup> and the Service's position with respect to the amortization of these similar intangibles provides a useful analogy to the amortization of the core deposit base.

### 3. *Abandonment of a Per Se Rule of Nondepreciability as to Other Intangible Assets*

Initially, the Service's position with regard to subscription and customer lists was that these assets have an indeterminate useful life<sup>43</sup> and therefore are nonamortizable. The Service consistently applied the same rationale to insurance expirations,<sup>44</sup> another intangible asset similar to subscription and customer lists.<sup>45</sup> The Service retreated from its stringent position, however, later conceding that these assets are not nonamortizable per se.<sup>46</sup> This change in the Service's policy on nonamortization was precipitated by a Tax

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39. See, e.g., *Sunset Fuel Co. v. United States*, 519 F.2d 781, 783-84 (9th Cir. 1975); *Marsh & McLennan*, 420 F.2d at 668-69; *Computing & Software*, 64 T.C. at 232.

40. *Welch v. Helvering*, 290 U.S. 111, 115 (1933); *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1245 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974).

41. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 479 (1988) (finding that "petitioner must show that the deposit base . . . had an ascertainable cost basis separate and distinct from the goodwill . . . of the [a]cquired [b]anks"), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990); see also *Houston Chronicle*, 481 F.2d at 1245-51.

42. See *infra* notes 219-25, 232-39 and accompanying text.

43. Rev. Rul. 65-175, 1965-2 C.B. 41 ("An analogy may be drawn to cases involving customer lists and newspaper subscription lists, wherein it has been held that these assets are not exhausted by time, and maintain a continuing value and useful life which precludes the allowance of any deduction for exhaustion thereof.")

44. See, e.g., Rev. Rul. 65-180, 1965-2 C.B. 279.

45. See *infra* notes 226-31 and accompanying text.

46. Rev. Rul. 74-456, 1974-2 C.B. 65 (finding that customer and subscription lists and insurance expirations are not nonamortizable as a matter of law and that these assets will be amortizable in the *unusual* case where the asset may be shown to be separate and distinct from goodwill and used in a trade or business for a limited period). Under this ruling, "Rev. Rul. 65-175 and 65-180 are modified to remove any implication that customer and subscription lists, location contracts, insurance expirations . . . are as a matter of law, indistinguishable from goodwill possessing no determinable useful life." *Id.*; see also Retail Industry Specialization Program of Position Papers—Customer Based Intangibles, *Tax Analyst's Daily Tax Highlights & Documents*, July 23, 1990, at 802.

Court decision<sup>47</sup> in which the taxpayer was permitted to amortize an acquired customer list after sustaining the high burden of proof with respect to the asset's useful life.<sup>48</sup> Under its "new" position, the Service will permit a depreciation deduction in the *unusual* case where a customer list or similar intangible asset does not possess the characteristics of goodwill, is subject to individual valuation, and has a determinable useful life.<sup>49</sup> The Tax Court framed the issue as one of fact and opened the door for a case by case approach to defining the outer bounds of the depreciation deduction for intangible assets.

## II. *MIDLANTIC THRU CITIZENS: THE ROAD TO AMORTIZABILITY*

### A. *Midlantic: The Failed Bank Situation*

The first major case in the development of amortization of acquired core deposits was *Midlantic National Bank v. Commissioner*.<sup>50</sup> Eatontown National Bank (ENB) was a failing bank that the Comptroller of the Currency<sup>51</sup> declared insolvent and ordered closed.<sup>52</sup> ENB's president embezzled nearly four million dollars from the bank, and the extensive media coverage severely diminished, if not eliminated, any goodwill attributable to ENB.<sup>53</sup> The Federal Deposit Insurance Corporation (FDIC) was responsible for paying off ENB's depositors up to the amount of their deposit insurance.<sup>54</sup> To defray the cost of the bank failure, the FDIC sought bids from financial institutions for the right to solicit deposits from former ENB depositors on the date that the FDIC paid the claims.<sup>55</sup> The solicitation right was valuable to banking institutions because it afforded them a means of acquiring a significant amount of funds in a brief period of time.<sup>56</sup> Midlantic submitted a

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47. *Manhattan Co. v. Commissioner*, 50 T.C. 78 (1968).

48. *Id.* at 91-92 (based upon the facts contained in the record, the court determined that the taxpayer sustained its burden of proof, thereby justifying an allocation of the purchase price of a customer list among the depreciable and nondepreciable portions).

49. Rev. Rul. 74-456, 1974-2 C.B. 65.

50. 46 T.C.M. (CCH) 1464 (1983).

51. The Office of the Comptroller of the Currency is within the United States Department of the Treasury. *Id.*

52. *Id.*

53. *Id.* at 1465.

54. *Id.* The insurance limit then applicable was \$20,000; any depositor with a balance above this limit generally stood to lose the excess. *Id.*

55. The solicitation right permitted the financial institution to be on the ENB premises on the specific day the FDIC paid the funds to the former ENB depositors. *Id.* As a depositor received its check and exited the bank, the financial institution's employees sought to have the former ENB depositor deposit its money with their institution. *Id.*

56. *Id.* at 1465-66.

final bid of \$1,500,110 for the solicitation right and was the successful bidder.<sup>57</sup>

Despite Midlantic's attempts to disassociate itself from ENB, Midlantic's total acquired deposits were substantially lower than its projections.<sup>58</sup> The reduced dollar value of the acquired deposits was due in part to the customers' "badwill" toward ENB and to a skepticism toward all banks, including Midlantic, as a result of ENB's mismanagement.<sup>59</sup> In total, Midlantic acquired 1,755 deposit accounts equaling \$2,505,627.<sup>60</sup> For tax purposes, Midlantic allocated \$696,763 of the bid price to the real property, based upon an appraisal of the building, and the residual sum of \$803,347 to the solicitation right.<sup>61</sup> Midlantic subsequently attempted to amortize the allocated cost of the solicitation right over the estimated useful life of the acquired core deposits.<sup>62</sup>

The Service challenged Midlantic's amortization deductions, contending that Midlantic must allocate the value attributable to the solicitation right among various nonamortizable intangible assets similar and inseparable from goodwill.<sup>63</sup> The Tax Court held that because of the failed bank status of ENB, Midlantic did not acquire goodwill or going concern value.<sup>64</sup> Once the court established that Midlantic acquired no goodwill, it determined that the bank could prevail, provided the bank demonstrated that the solicitation right had a limited useful life.<sup>65</sup> Noting that this determination was an issue

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57. *Id.* at 1466. Midlantic estimated that the building and improvements were worth between \$700,000 and \$800,000 and that the solicitation right was worth approximately \$700,000. *Id.* The value of the solicitation right was based upon a "rule of thumb" applied in bank acquisitions that appraised the value of acquired core deposits at between six and seven percent of the bank's total core deposits. *Id.* Midlantic estimated that ENB had \$16,000,000 in total deposits and that they could acquire between \$8,000,000 and \$10,000,000 of these total deposits. *Id.* Applying the "rule of thumb," Midlantic calculated the value of the solicitation right as \$700,000. *Id.* In *Midlantic*, the successful bidder also acquired the property rights to the building and other real property owned by ENB.

58. *See id.* at 1467, 1473.

59. *Id.*

60. *Id.*

61. *Id.* at 1468.

62. *Id.* at 1468-69.

63. *Id.* at 1470.

64. *Id.* at 1471 ("To the contrary, the record shows that petitioner did not even consider goodwill in formulating its bid . . . because it had reached the none-too-difficult conclusion that a bank that had failed and had been closed had no goodwill to offer.").

65. *Id.* at 1474. In addition, the Commissioner attempted to allocate the bid price to "various intangible assets," which the Service considered nonamortizable. *Id.* at 1471. These intangible assets included advantageous location, the expectation that depositors would return to the familiar location, the expectation of immediate FDIC approval for a branch office, the solicitation of ENB employees, and going concern value. The court, however, rejected these assertions. *Id.* at 1471-73.

of fact,<sup>66</sup> the court concluded that the solicitation right was a depreciating asset with an ascertainable useful life.<sup>67</sup>

The Tax Court's decision in *Midlantic* was important in two respects. First, the court held that the acquired solicitation right was a wasting asset that had a determinable useful life.<sup>68</sup> The *Midlantic* court did not hold as a matter of law that this intangible had an unlimited useful life.<sup>69</sup> Instead, the court established that the taxpayer need only estimate the intangible's useful life as he would any other recognized depreciable asset to obtain a depreciation deduction.<sup>70</sup> By framing the issue as one of fact, the court made it easier for taxpayers to prove a limited useful life with "reasonable accuracy." To satisfy his burden of proof, the taxpayer must provide the court with detailed supporting documentation, such as expert reports.<sup>71</sup>

Second, the court held that the intangible asset itself, in this case the solicitation right, had a value "akin to th[at] . . . of a customer list."<sup>72</sup> By classifying the intangible in the category of customer lists, which are amortizable assets, instead of linking the asset to goodwill, the court directed its analysis of the deposit base towards depreciability.<sup>73</sup> While the intangible asset at issue in *Midlantic* was not the core deposit base intangible, but rather the right to solicit depositors,<sup>74</sup> the findings of the court provided a foundation upon which the later core deposit base decisions could evolve.

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66. *Id.* at 1469, 1474-75; see also *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1245-51 (5th Cir. 1973) (finding that the issue of whether subscription lists are amortizable assets is a question of fact), *cert. denied*, 414 U.S. 1129 (1974). After reviewing the prior case law, the *Houston Chronicle* court stated: "Each of these cases represents the failure of a given taxpayer to carry his burden of bringing his claim within the *factual* borders that would support an amortization deduction—none rules that the asset involved is *per se* non-amortizable." *Id.* at 1247; see also *Commissioner v. Seaboard Fin. Co.*, 367 F.2d 646, 650-51 (9th Cir. 1966) (holding that there was no legal question presented and determining that the Tax Court's findings of fact were not clearly erroneous).

67. *Midlantic*, 46 T.C.M. (CCH) at 1474. The court, however, allocated ten percent of the solicitation right to an element of nonamortizable value, reasoning that a small number of accounts acquired had substantially larger balances. *Id.* The evidence indicated that these accounts had a longer useful life, which the taxpayer could not reasonably estimate. *Id.* at 1474 n.18.

68. *Id.* at 1470, 1474.

69. *Id.* at 1470.

70. *Id.* at 1469.

71. See, e.g., *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 469-73, 514 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990). The petitioner overcame its proof requirements by performing a detailed analysis contained in the report submitted to the court. *Id.*; see also *infra* notes 130-32 and accompanying text.

72. *Midlantic*, 46 T.C.M. (CCH) at 1469.

73. See generally *id.* at 1464-75.

74. *Id.* at 1464. The right to solicit depositors, however, is a cost attributable to the acquired deposit accounts. Therefore, the taxpayer should write off the cost of the solicitation right as the acquired deposit accounts close. This analysis parallels the analysis regarding the

*B. Banc One: Denial of Depreciation Deductions Based Upon a Post Hoc Determination of Useful Life*

*Banc One Corp. v. Commissioner*,<sup>75</sup> the first Tax Court case to directly address the issue of amortization of the core deposit base,<sup>76</sup> reinforced the fact sensitive analysis set forth in *Midlantic*.<sup>77</sup> Banc One acquired two banks: First Citizens (Citizens)<sup>78</sup> and Athens National Bank (Athens).<sup>79</sup> The original purchase agreements between the parties did not allocate the purchase price among the assets.<sup>80</sup> Banc One engaged an accounting firm to perform the necessary allocations after completing the purchases.<sup>81</sup> The accounting firm allocated a portion of the purchase price to the deposit base intangible and amortized this cost on Banc One's tax returns.<sup>82</sup> The Service, disallowing the amortization deductions attributable to the deposit base, determined that Banc One's tax returns were deficient in the amount of \$1,422,528.<sup>83</sup>

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write off of the deposit base intangible. The portion of the core deposit base attributable to each acquired deposit account is written off as the deposit account closes. Therefore, while the intangible in *Midlantic* is not the core deposit base, it is sufficiently analogous to warrant consideration.

75. 84 T.C. 476 (1985), *aff'd*, 815 F.2d 75 (6th Cir. 1987).

76. *Id.* Cf. *Southern Bancorp. v. United States*, 732 F.2d 374 (4th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985). In *Southern Bancorp.*, the taxpayer argued, in the alternative, that it could amortize the purchase price premium attributable to the acquired core deposit base. *Id.* at 377. The taxpayer did not pursue the issue at trial however; nor did the taxpayer sustain the allegations. *Id.* at 376 n.2, 377 n.6.

77. See generally *Banc One*, 84 T.C. at 498-02.

78. *Id.* at 487-88. Banc One acquired First Citizens in mid-1973 for approximately \$11,500,000. *Id.*

79. *Id.* at 480, 484. Banc One acquired Athens in late 1974 for approximately \$49,000,000. *Id.*

80. *Id.* at 479, 487.

81. *Id.* at 479, 481. The allocation consisted of a two step process whereby the assets were restated at their fair market values. *Id.* at 481. The accounting firm allocated the difference between the purchase price and the fair market value of the assets proportionally among the individual assets based upon the ratio of the individual asset's value to the total fair market value of all the assets. *Id.* The firm included goodwill in step one of the allocation based upon a capitalized average annual excess return figure. *Id.* at 482-83. It then increased the goodwill/going concern values along with the other assets in accordance with the second step of the allocation procedure. *Id.* at 484, 488. The court refused to permit the two step allocation and required the taxpayer to use the residual method. *Id.* at 506 ("[U]se of the residual method [of valuation] is proper in the present case, and we would reject [the accounting firm's] determinations under the formula method on that basis alone."). Generally, the residual method requires that the taxpayer allocate the purchase price among the assets, both tangible and intangible, up to their fair market value with the residual allocated to goodwill. 15 MERTEN'S LAW OF FEDERAL INCOME TAX § 59.71 (1989) [hereinafter MERTEN].

82. *Banc One*, 84 T.C. at 489.

83. *Id.* at 476.

The Service attacked Banc One's allocation and amortization deductions on several grounds. The Service determined that the deposit base was not separable from goodwill and that it was self regenerative and therefore did not have a limited useful life.<sup>84</sup> The Service also found that the bank's method of depreciation was improper.<sup>85</sup> Overlooking the Service's first two main claims, the court disallowed the deductions based upon Banc One's post hoc method of depreciation.<sup>86</sup> In quantifying the amount of the deduction, Banc One relied upon reports prepared almost six years after the purchases to demonstrate that the deposit base was a wasting asset with a limited useful life.<sup>87</sup> Although the court recognized that absolute certainty was not required as to the asset's useful life,<sup>88</sup> it stressed that prediction of the asset's useful life was the core of depreciation accounting.<sup>89</sup> The court would not permit the taxpayer to rely upon expert testimony using facts that occurred after the close of the tax year in order to establish the asset's lim-

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84. *Id.* at 498. If an asset is "self regenerative," the court determines that any wasting away of the asset is subsequently replaced and thus the asset as a whole does not have a limited useful life. See *Computing & Software, Inc. v. Commissioner*, 64 T.C. 223, 236 (1975) (holding an acquired customer list depreciable despite the fact that the internally generated credit information would replace the purchased information contained in the list). Under this theory, new depositors would replace the acquired depositors that are lost. Without a loss of depositors, there is no reduction in the bank's core deposits. This argument, however, does not focus on the asset in question. The asset depreciated relates to the acquired core deposits and not to the bank's total core deposits. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 499 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990); *accord Computing & Software*, 64 T.C. at 236. As a bank loses its acquired core deposits, it should reduce the corresponding deposit base intangible proportionally. Thus, when the total acquired core deposits are reduced to zero, the deposit base intangible should also be zero. The fact that the bank's own internally generated core deposits are slowly replacing the acquired core deposits has no bearing upon the depreciability of the *acquired* core deposits.

85. *Banc One*, 84 T.C. at 498.

86. *Banc One*, 84 T.C. at 498-501. A post hoc method of depreciation is one that is selected after the fact. *Id.* at 498. Courts generally have required that the taxpayer determine the method of depreciation as of the close of the taxable year based upon the facts as they exist at the close of the year. See, e.g., *id.* at 499; *Western Terminal Co. v. United States*, 412 F.2d 826, 826-27 (9th Cir. 1969); *Commissioner v. Cleveland Adolph Mayer Realty Corp.*, 160 F.2d 1012, 1013-15 (6th Cir. 1947); *Roy H. Park Broadcasting v. Commissioner*, 78 T.C. 1093, 1122 (1982); *Airport Bldg. Dev. Corp. v. Commissioner*, 58 T.C. 538, 541 (1972); *Westinghouse Broadcasting Co. v. Commissioner*, 36 T.C. 912, 921-22 (1961), *aff'd*, 309 F.2d 279 (3d Cir. 1962), *cert. denied*, 372 U.S. 935 (1963).

87. *Banc One*, 84 T.C. at 490, 498.

88. *Id.* at 499 ("[T]he taxpayer need only determine a 'reasonable approximation' for depreciation; absolute certainty is not required." (citing *Burnet v. Niagara Falls Brewing Co.*, 282 U.S. 648 (1931); *Super Food Serv., Inc. v. United States*, 416 F.2d 1236 (7th Cir. 1969); *Spartanburg Terminal Co. v. Commissioner*, 66 T.C. 916 (1976))).

89. *Id.*

ited useful life.<sup>90</sup> Furthermore, because the court denied the depreciation deduction based upon the taxpayer's post hoc method of depreciation, it refused to consider whether the core deposit base possessed a value separate and distinct from goodwill.<sup>91</sup> Although the court reserved judgement on the separate and distinct analysis, however, it reinforced *Midlantic's* fact sensitive approach.

The court in *Banc One* addressed the burden of proof issue as to the deposit base intangible's useful life because an important distinguishing feature in *Banc One* was not present in the facts of the *Midlantic* case. Because *Midlantic* was a "failed" bank situation,<sup>92</sup> the *Midlantic* court disposed of the separate and distinct issue summarily. Reasoning that ENB had no goodwill,<sup>93</sup> the court determined that the solicitation right was separate and distinct from goodwill.<sup>94</sup> In *Banc One*, however, the acquired banks were solvent, and there were no major adverse factors evidencing a lack of goodwill.<sup>95</sup> Therefore, the *Banc One* court had to address either the separate and distinct issue or dispose of the case on other grounds. Emphasizing the taxpayer's failure to prove that the asset had a limited useful life at the time the asset was acquired, the court denied the deduction without addressing the separate and distinct requirement.<sup>96</sup> Thus, the *Banc One* court was spared from analyzing the issue of whether the deposit base had a value separate and distinct from goodwill. This issue was finally ripe for decision, however, in *AmSouth Bancorp. v. United States*.<sup>97</sup>

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90. *Id.* at 498-99; see also *Western Terminal Co.*, 412 F.2d at 826-27 (the trial court should not permit the use of hindsight evidence to determine useful life); *Cleveland Adolph Mayer Realty Corp.*, 160 F.2d at 1015 ("The crucial factor is not what 'now appears', but what 'then appeared' to be the useful life of the [asset]; that is, what reasonably was known and ascertainable at the end of each of such periods as to the reasonably foreseeable useful life of the [asset].") (quoting *Commissioner v. Mutual Fertilizer Co.*, 159 F.2d 470, 472 (5th Cir. 1947) (emphasis omitted)); *Roy H. Park Broadcasting*, 78 T.C. at 1122; *Airport Bldg. Dev. Corp.*, 58 T.C. at 541; *Westinghouse Broadcasting Co.*, 36 T.C. at 921-22.

91. *Banc One*, 84 T.C. at 502 n.6.

92. See *supra* text accompanying notes 51-55, 64-65.

93. See *Midlantic Nat'l Bank v. Commissioner*, 46 T.C.M. (CCH) 1464, 1471 (1983).

94. *Id.* It again should be mentioned that the solicitation right differs from the core deposit base, but the depreciability of both assets hinges upon their relationship to the acquired core deposits. See *supra* note 74.

95. *Banc One*, 84 T.C. at 506-07. The purchaser tried to establish that one of the acquired banks had no goodwill based upon an average excess earnings calculation. *Id.* at 505-06. Although the court disagreed with the purchaser's argument, it disallowed the deduction on other grounds. *Id.* at 498.

96. *Id.* at 498, 502 n.6.

97. 681 F. Supp. 698 (N.D. Ala. 1988).

C. *AmSouth: Shifting the Analysis from Useful Life to a Determination of Whether There is a Value Separate and Distinct from Goodwill*

In *AmSouth*, the United States District Court for the Northern District of Alabama was forced to address the separate and distinct nature of the core deposit base, an issue that the Tax Court avoided in *Banc One*, when AmSouth acquired the assets and liabilities of the Bank of East Alabama (BEA).<sup>98</sup> Although the bank had not failed as in *Midlantic*, BEA was in a "distressed" condition due to numerous bad loans and alleged criminal activity on the part of BEA's former president.<sup>99</sup> At the time of the sale, AmSouth did not allocate the purchase price among the individual assets and there was no evidence of any realistic negotiations as to the value of the deposit base.<sup>100</sup> A few months after the parties executed the agreement for sale, however, AmSouth executed another agreement with BEA, detailing the allocation of the purchase price among the various assets.<sup>101</sup>

AmSouth subsequently engaged two firms to determine the value and estimated useful life of the acquired deposit base.<sup>102</sup> Both firms used BEA's history of closed accounts, as well as mortality and relocation rates, in formulating their opinions.<sup>103</sup> Recognizing that there was no "scientifically accurate way to measure" the life of the deposit base, the court determined that the estimates of the two analysts may be reasonable.<sup>104</sup> Here, the seeds planted by the Tax Court in *Midlantic*, when it stated that the deposit base

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98. The acquisition occurred during February of 1979, and the acquisition price was approximately \$4,800,000. *Id.* at 699.

99. *Id.* at 703-05. The former bank president had used funds from the bank for his personal benefit. *Id.* Consequently, there were numerous criminal charges brought against him. *Id.* In spite of the negative publicity, the court stated that there was "no substantial evidence that the publicity *itself* adversely affected the bank's financial status or goodwill." *Id.* at 704.

100. *Id.* at 702.

101. The final agreement allocated \$1,700,000, approximately one-quarter of the total sales price, to the customer deposit base. *Id.* at 702-03.

102. *Id.* at 705. Ernst & Ernst, an accounting firm, determined the value of the deposit base intangible by calculating the differential between AmSouth's incremental borrowing rate and the alternative funds rate. This differential is multiplied by the projected average balances of the acquired core deposits over its estimated useful life. *Id.* Golembe & Associates, Inc., a bank consulting firm, estimated that the value of the core deposit base was equal to the "discounted present value of the projected net income" stream generated by that portion of the core deposits that remained at the end of each successive year over the life of the acquired core deposits. *Id.* at 705-06.

103. *Id.* at 706.

104. *Id.*

might have a limited useful life,<sup>105</sup> and fortified in *Banc One*, began to bear fruit.

The court stated that *Midlantic* suggested a taxpayer could ascertain the life of the acquired deposit base with some degree of accuracy.<sup>106</sup> AmSouth learned from the mistakes of Banc One and engaged its experts to value the deposit base as of the close of the tax year.<sup>107</sup> AmSouth appeared to fulfill the requirements set forth in the prior core deposit cases: substantiation of the asset's limited useful life to overcome the burden of proof; and estimation based upon facts as of the close of the tax year.<sup>108</sup> The court, however, reversed the technique used by the Tax Court in *Banc One*. The court, bypassing the analysis of limited useful life, concluded that the plaintiff did not sustain the burden of proof that the deposit base had a value separate and distinct from goodwill.<sup>109</sup>

In the court's analysis of the separate and distinct requirement, it elaborated on the handling of the deposit base intangible under Generally Accepted Accounting Principles (GAAP) as well as under the regulatory rules promulgated by the Comptroller of the Currency and the FDIC.<sup>110</sup> Although both GAAP and the regulatory agencies permit the amortization of the core deposit base, the court disregarded the agencies' treatment of the issue on the ground that there were varying purposes served by their respective rules.<sup>111</sup> The court noted that the goal of taxation was to provide funding for the operation of the government.<sup>112</sup> The court also stated that the taxpayer need not treat the transaction for tax purposes in the same manner

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105. See *Midlantic Nat'l Bank v. Commissioner*, 46 T.C.M. (CCH) 1464, 1474-75 (1983); see also *supra* text accompanying notes 65-71. It is important to note that the intangible asset in question in *Midlantic* was not the deposit base intangible, but the solicitation right. *Id.* at 1464; see also *supra* note 74.

106. *AmSouth*, 681 F. Supp. at 714.

107. *Id.* at 699, 705.

108. See, e.g., *Banc One Corp. v. Commissioner*, 84 T.C. 476, 492 (1985), *aff'd*, 815 F.2d 75 (6th Cir. 1987); *Midlantic*, 46 T.C.M. (CCH) at 1469.

109. *AmSouth*, 681 F. Supp. at 721 n.61 ("[I]t has not been necessary for the court to address specifically the issue of whether the customer deposit base has an ascertainable value which has a limited useful life, the duration of which can be determined with reasonable accuracy.").

110. *Id.* at 707-11.

111. *Id.* The primary goal of financial accounting is to keep investors, management, and creditors informed as to an entity's financial position. *Id.* at 710. This goal requires the greatest amount of detail possible; the financial attributes of a business should be broken down into as many component parts as possible to present a more accurate picture. *Id.* at 707. The goal of regulatory agencies is to carry out the mandate of the legislature to protect the public from fraud, and to require that the taxpayers meet certain minimum capitalization thresholds. See *id.* at 707.

112. *Id.* at 710.

as would financial accountants or regulatory agencies.<sup>113</sup> The court, moreover, observed that even though GAAP and the FDIC rules recognized the deposit base intangible as an identifiable part of goodwill, this recognition did not mean that the intangible was an asset wholly separate from goodwill.<sup>114</sup> Under this reasoning, the taxpayer's burden as to the separate and distinct requirement is significantly higher than merely proving that the deposit base has a separate value apart from goodwill;<sup>115</sup> the deposit base must be separate and distinct from goodwill as a whole. Unfortunately, the court did not clarify the requirements necessary for satisfying this higher standard.

After noting several recognized definitions of goodwill,<sup>116</sup> the *AmSouth* court presumed that the deposit base was not separate and distinct from goodwill.<sup>117</sup> Based upon this presumption, the court determined that AmSouth bore the burden of establishing its right to claim a depreciation deduction and proving the separate and distinct requirement.<sup>118</sup> The court held that AmSouth did not sustain its burden as to this requirement.<sup>119</sup> The court concluded that any premium attributable to the core deposits is too closely linked to the old depositors returning to the familiar place, thereby characterizing the premium as goodwill.<sup>120</sup>

The court in *AmSouth* followed the lead of *Midlantic* and *Banc One* by focusing on the proof as to the required elements for amortizability, rather than ruling as a matter of law that the deposit base was nonamortizable.<sup>121</sup> The limited useful life requirement, as evidenced in *Midlantic*<sup>122</sup> and *Banc One*,<sup>123</sup> did not trouble those courts to the same degree as did the separate and distinct requirement. As the core deposit base gained recognition by the

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113. *Id.*

114. *Id.* at 708.

115. *Id.*

116. *Id.* at 712 ("[t]he nature of goodwill is the expectancy that 'the old customers will resort to the old place,' . . . . The essence of goodwill is the expectancy of *continued* patronage, *for whatever reason.*"); see also *infra* text accompanying notes 164-67.

117. *AmSouth*, 681 F. Supp. at 712.

118. *Id.* (citing *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1245 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974)).

119. *Id.* at 719.

120. *Id.* at 720.

121. *Id.* at 713.

122. *Midlantic*, 46 T.C.M. (CCH) at 1474.

123. *Banc One*, 84 T.C. at 498-501. Although the court in *Banc One* denied the depreciation deduction based upon the asset's lack of a limited useful life, the thrust of the court's decision was not based upon a finding that the core deposit intangible's life was indefinite. Rather, the holding rested squarely on the taxpayer's post hoc method of depreciation. *Id.* at 498; see also *supra* text accompanying notes 86-90. Therefore, the court, although implying that the deposit base intangible may have a limited useful life, disregarded *Banc One*'s determination because *Banc One* estimated this limited life after the close of the tax year.

regulatory agencies,<sup>124</sup> and as it proved to be a bona fide asset in many bank acquisitions, courts realized that the intangible was not the product of phony accounting practices<sup>125</sup> or a mere chimera.<sup>126</sup> Despite the established law on the core deposit base, the Tax Court attempted to further clarify its understanding of the amortization of the core deposit intangible in *Citizens & Southern Corp. v. Commissioner*.<sup>127</sup>

*D. Citizens & Southern: Recognition that the Core Deposit Base is Separate and Distinct from Goodwill*

In *Citizens & Southern Corp. v. Commissioner*,<sup>128</sup> the Tax Court readdressed the issue of core deposit base amortization. Citizens & Southern acquired nine banks during a two-year period.<sup>129</sup> The bank allocated the purchase price among the assets of the acquired banks and calculated the value of the deposit intangible based upon detailed valuation reports that were prepared prior to the acquisition date.<sup>130</sup> For three years following these purchases, Citizens & Southern also performed impairment studies to

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124. This fact is evidenced by the Comptroller of the Currency's change in policy which now permits the amortization of the deposit base intangible for bank reporting purposes. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 497 (1988) (citing the changes in the rules by the regulatory agencies, which now mandates the amortization of the deposit base), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

125. See, e.g., *AmSouth*, 681 F. Supp. at 711 n.45. The court noted that some commentators have suggested that accountants tend to define "generally accepted" as "somebody [has] tried it." *Id.* (quoting an unidentified authority).

126. *Id.* at 716. A chimera is an "illusion or fabrication of the mind." WEBSTER'S THIRD NEW INT'L DICTIONARY 389 (1981).

127. 91 T.C. 463 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

128. *Id.*

129. *Id.* at 466. The two year period ran from 1981 to 1982, and the total purchase price for the nine banks exceeded \$461 million. *Id.* at 466-68.

130. *Id.* at 468-73. Citizens & Southern began the valuation procedure by calculating the survival probabilities of the various accounts. *Id.* at 469. This "lifing analysis" consisted of three phases. First, Citizens & Southern gathered account information including the account holder's name, the date on which the account was opened, and the dollar balance. *Id.* at 469-70. Second, Citizens & Southern conducted a month by month observation for a three to thirteen month period, which focused on the number of closed accounts during each of the months observed. *Id.* at 470. Citizens & Southern classified the closed accounts by type and age, basing the classification upon the date the account was opened. *Id.* Lastly, Citizens & Southern combined the monthly results into a runoff table detailing the probability that an account of a specific age group would remain open for a specified period of time. *Id.* at 470-71.

The next step in the valuation process was to determine the projected net investable balance for each of the accounts. *Id.* at 471. Citizens & Southern multiplied the balance in the accounts at the valuation date by the survival probabilities calculated in the lifing analysis and subtracted the float and reserve requirements to determine the projected net investable balance. *Id.* Float represents the uncollected funds in the accounts; these funds are not available for investment because of the lag time in collection of the funds. *Id.* The regulatory agencies

determine whether its initial calculations were correct.<sup>131</sup> These valuation studies showed that there was no material difference between either the number of accounts actually closed and the bank's estimated account closures, or the actual dollar balances and the projected balances in the accounts that comprised the acquired core deposits.<sup>132</sup> In addition, Citizens & Southern calculated its annual depreciation deduction as of the acquisition date, by using the present value of the projected income stream from the acquired core deposits for each year valued.<sup>133</sup> The Commissioner disallowed the deductions and sought deficiencies in excess of seven million dollars,<sup>134</sup> arguing, among other issues, that Citizens & Southern failed to substantiate the limited useful life and separate and distinct requirements of the core deposit intangible.

In *Citizens & Southern*, the Tax Court first stated that the petitioner must, as a threshold matter, show that the "deposit base [was] an asset separate and distinct from goodwill" as delineated in prior case law.<sup>135</sup> The court distinguished the record in *Citizens & Southern* from the record in *Am-South*.<sup>136</sup> This distinction compelled a different result.<sup>137</sup> The court also rejected the argument that prior case law established a per se rule of nonamortizability.<sup>138</sup> The court only required that the taxpayer carry his

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require that the banks keep reserve requirements on hand; those funds are also unavailable for investment. *Id.*

In the third step, Citizens & Southern computed the projected earnings from the net investable balances. *Id.* This figure equals the difference between the earnings and costs associated with the balances. *Id.* at 471-72. The earnings on the net investable balances equals the sum of the interest income the funds will generate and the service charge income on each account. *Id.* at 472. The costs associated with the net investable balances equal the sum of the interest expense paid out to account holders and the processing and overhead costs of each account. *Id.* at 472-73. Citizens & Southern completed the valuation study by discounting the projected earnings on the net investable balances in each of the future years to its present value. *Id.* at 473.

131. *Id.* at 474-75.

132. *Id.*

133. *Id.* at 474.

134. *Id.* at 464.

135. *Id.* at 480.

136. *Id.* at 481.

137. *Id.*

138. *Id.* at 482. The court rejected the "mass asset rule." The mass asset rule states that where the purchased assets are indivisible or considered one "mass" without a determinable life, the Service will not allow a depreciation deduction with respect to any of the underlying assets in the mass. See, e.g., *Thrifitcheck Serv. Corp. v. Commissioner*, 33 T.C. 1038 (1960), *aff'd*, 287 F.2d 1 (2d Cir. 1961); *United States Indus. Alcohol Co. v. Commissioner*, 42 B.T.A. 1323 (1940), *aff'd in part, rev'd in part sub nom. United States Indus. Alcohol Co. v. Helvering*, 137 F.2d 511 (2d Cir. 1943); *Danville Press, Inc. v. Commissioner*, 1 B.T.A. 1171 (1925). The assets are in effect one "mass asset" in the nature of goodwill; they are therefore nondepreciable. *Citizens & Southern*, 91 T.C. at 482 (citing *Houston Chronicle Publishing Co. v.*

dual burden of proving that the asset was separate and distinct from goodwill and that it had a limited useful life.<sup>139</sup>

The court next rebutted each of the Commissioner's arguments. In particular, the Commissioner argued that the terminable at will nature of bank deposits rendered the deposit relationship a component of goodwill and therefore nonamortizable.<sup>140</sup> The court, however, determined that terminable at will<sup>141</sup> relationships were not equivalent to goodwill as a matter of law, citing several federal circuit courts of appeals cases to support its conclusion.<sup>142</sup> The court suggested that if the taxpayer could prove that the asset in question had a limited useful life, then the court might consider the asset as separate and distinct from goodwill.<sup>143</sup> After summarily disposing of several minor arguments by the Commissioner,<sup>144</sup> the court continued its analysis of the separate and distinct issue by noting two additional factors.

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United States, 481 F.2d 1240, 1249-50 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974)). Although some of the underlying assets may have limited useful lives, the deduction will be denied based upon the unlimited useful life of the mass. Winn-Dixie Montgomery, Inc. v. Commissioner, 444 F.2d 677 (5th Cir. 1971), *aff'g* 307 F. Supp. 1304 (N.D. Ala. 1969).

139. *Citizens & Southern*, 91 T.C. at 482.

140. *Id.* at 483.

141. Terminable at will relationships are those in which either party may end the relationship at any time for any reason. In the context of bank deposits, the depositor may withdraw its funds at any time for any reason.

142. *Citizens & Southern*, 91 T.C. at 483 (citing *Sunset Fuel Co. v. United States*, 519 F.2d 781 (9th Cir. 1975); *Skilken v. Commissioner*, 420 F.2d 266 (6th Cir. 1969); *Boe v. Commissioner*, 307 F.2d 339 (9th Cir. 1962); *Thrifitcheck Serv. Corp. v. Commissioner*, 287 F.2d 1 (2d Cir. 1961); *United States Indus. Alcohol Co. v. Helvering*, 137 F.2d 511 (2d Cir. 1943); *Imperial News Co. v. United States*, 576 F. Supp. 865 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1434 (2d Cir. 1984); *General Television, Inc. v. United States*, 449 F. Supp. 609 (D. Minn. 1977), *aff'd per curiam*, 598 F.2d 1148 (8th Cir. 1979); *Golden State Towel & Linen Serv., Ltd. v. United States*, 179 Ct. Cl. 300 (1967)).

143. *Citizens & Southern*, 91 T.C. at 483-89.

144. First, the Commissioner argued that the acquired core deposits are a liability to the bank and that any attempt to recharacterize it as an asset is misleading. *Id.* at 490. Rejecting this argument, the court held that what the taxpayer has quantified is the future benefit from the deposit liabilities, which qualify as an asset to the bank. *Id.* Next, the court rejected outright the Commissioner's argument that it should deny the deduction because the treatment by the purchaser is inconsistent with that of the seller. *Id.* The court noted that if it accepted the Commissioner's argument, the effect upon goodwill itself would be curious. *Id.* at 491 n.14. Because the seller does not reflect the internally created goodwill on its books, the issue of whether an intangible is apart from goodwill would never arise because the purchaser would not record goodwill in the first place. *Id.* The Commissioner next argued that the "deposit base cannot be transferred apart from a transfer of the goodwill of a bank" and that it is inseparable from the goodwill. *Id.* at 492. Relying upon *Laird v. United States*, 556 F.2d 1224 (5th Cir. 1977), the court refused to require the separate transferability of the core deposits to establish that the intangible has a value separate and distinct from goodwill. *Citizens & Southern*, 91 T.C. at 492-93. The court also rejected the Commissioner's arguments that *Citizens & Southern's* calculation of the acquired bank's goodwill was greatly undervalued, that the allo-

First, the court opined that the fact that customers may open new accounts as old accounts are closed does not make the deposit base self regenerative.<sup>145</sup> The court noted that the value of the deposit base reflects only the accounts purchased at the acquisition date.<sup>146</sup> Thus, any subsequent accounts opened by Citizens & Southern will be internally generated and will not give rise to, or increase, the acquired core deposits. Second, the court posited that the value of the deposit base does not rest upon a vague notion that depositors will leave their deposits in the bank for some unspecified time period.<sup>147</sup> Rather, as the bank's expert pointed out, depositors are subject to an inertia;<sup>148</sup> the value of the deposit base "rests upon the ascertainable probability that [this] inertia" will force depositors to maintain their accounts for predictable intervals of time.<sup>149</sup> The court thereby concluded that the "deposit base has an ascertainable cost basis separate and distinct from [both] the goodwill and the going-concern value of the [a]cquired [b]anks."<sup>150</sup>

The court significantly refined its separate and distinct analysis in *Citizens & Southern*. The court implicitly redefined the issue to be whether a *portion* of the deposit base is separate and distinct from goodwill, rather than determining whether the deposit base must be *wholly* separate and distinct from

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cation was purely tax motivated and "self-serving accounting shenanigans," and that the premium was attributable to the insurance protection provided by the FDIC. *Id.* at 493-95.

145. *Id.* at 499 (citing *Computing & Software, Inc. v. Commissioner*, 64 T.C. 223, 236 (1975)). The court in *Computing & Software* held that a purchased file containing customers' credit information was an intangible asset separate and distinct from goodwill with a limited useful life. *Computing & Software*, 64 T.C. at 232, 236. The Commissioner in *Computing & Software* missed the issue because the wasting asset was the credit information contained in the files at the date of purchase. Moreover, the Commissioner failed to recognize that the fact that new credit information would replace the purchased information did not require a holding that the purchased credit file had an indefinite life. *Id.* at 236-37.

The credit file in *Computing & Software* parallels the deposit base intangible. As the acquired depositors close their accounts, new depositors will replace them. This should not affect the determination regarding the acquired core deposits. In addition, one can argue that the depositor is not required to close its account in order to prove that the core deposits are "wasting." Rather, as the depositor withdraws the funds that were the subject of the acquisition from its account, the acquired deposit base has in fact "wasted." If the depositor subsequently deposits additional funds into its account, these new funds are internally generated core deposits and as such are not depreciable. *See supra* note 84.

146. *Citizens & Southern*, 91 T.C. at 499.

147. *Id.*

148. *Id.* at 500. Financial analysts base this inertia upon a combination of transactional costs, interest rate differentials, and dissatisfaction with the quality of the services the bank provides. *Id.* The sum of the interest rate differentials and the value assigned to the dissatisfaction with the bank's services must be greater than the transactional costs before a customer will overcome the inertia and remove his deposited funds. *Id.*

149. *Id.*

150. *Id.*

goodwill.<sup>151</sup> Furthermore, the court recognized that this portion of the deposit base that is separate and distinct from goodwill may have a limited useful life.<sup>152</sup> The court, answering these two questions in the affirmative, afforded Citizens & Southern a depreciation deduction.<sup>153</sup>

By focusing on the question of whether a portion of the intangible's value, as opposed to the whole value, is separate and distinct from goodwill, the court's reasoning is circular. The issue for the court's consideration was whether the deposit base intangible is an asset separate and distinct from goodwill. By narrowing its focus to examining whether a portion of the deposit base is separate and distinct from goodwill, suggesting that it would permit a depreciation deduction for that separate portion, the court returned to its initial question of whether *that* portion of the deposit base is separate and distinct from goodwill. This subtle distinction, however, indicates that the court believes that at least some deduction is warranted based upon the separate nature of the deposit base intangible from goodwill. The fact that the taxpayer had substantial documentation as to the deposit base intangible's limited useful life was further support for the court's finding that at least a portion of the deposit base intangible is separate and distinct from goodwill.<sup>154</sup> Thus, the Tax Court held in *Citizens & Southern* that the core deposit base had an ascertainable cost basis separate and distinct from goodwill.<sup>155</sup> After reaching this conclusion, the court analyzed the useful life of the core deposit base.<sup>156</sup>

In making the useful life determination, Citizens & Southern did not fall into the trap that snared Banc One.<sup>157</sup> Citizens & Southern performed its allocations prior to the acquisition and performed its lifing analysis, an estimation of the deposit base intangible's useful life, as of the end of the tax year in question.<sup>158</sup> Two additional factors weighed in Citizens & Southern's favor. First, the valuation reports relied upon by Citizens & Southern were very detailed.<sup>159</sup> Second, Citizens & Southern performed follow up studies annually to validate its projections.<sup>160</sup> The court paid particular attention to the fact that the results of the follow up studies closely approxi-

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151. *Id.*; see also *id.* at 516 (Cohen, J., concurring) (expressly defining the issue).

152. *Id.* at 500.

153. *Id.* at 514.

154. *Id.* at 500-10.

155. *Id.* at 500.

156. See *id.* at 500-05.

157. See *supra* notes 86-90 and accompanying text.

158. *Citizens & Southern*, 91 T.C. at 468-73; see also *supra* note 130.

159. *Citizens & Southern*, 91 T.C. at 468-73; see also *supra* note 130.

160. *Citizens and Southern*, 91 T.C. at 501-02; see also *supra* text accompanying notes 131-32.

mated Citizens & Southern's estimates in rebutting several of the Commissioner's allegations.<sup>161</sup> The court, therefore, concluded that the Citizens & Southern acquired deposit base had a limited useful life, which the bank ascertained with reasonable accuracy.<sup>162</sup> Thus, Citizens & Southern established the two elements necessary in order to qualify for a depreciation deduction with respect to the deposit base.<sup>163</sup>

The *Citizens & Southern* court shifted its focus onto the proof offered in support of the intangible asset's limited useful life and away from the separate and distinct requirement. The court appeared willing, however, to continue inquiring into the characteristics of goodwill and the nature of the intangible to determine whether there were two distinct assets or whether the taxpayer was merely attempting to carve out and depreciate a portion of goodwill. Assuming there are two distinct assets, the court's limited useful life analysis determines what portion, if any, of the "separate" asset the taxpayer can depreciate.

### III. GOODWILL VERSUS CORE DEPOSITS: SEPARATE AND DISTINCT?

#### A. Characteristics of Goodwill

The case law does not set forth a precise definition of goodwill; instead, one must synthesize numerous catch phrases to fully grasp the concept of goodwill.<sup>164</sup> Some courts have defined goodwill as the expectancy that "old customers will resort to the old place"<sup>165</sup> or the "expectancy of continued patronage, for whatever reason."<sup>166</sup> In addition, courts have recognized that

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161. *See id.* at 502-05. The court stated:

This comparison also shows that the validity of the petitioner's projections was corroborated by the actual closures.

....

Petitioner's followup study, however, shows that its projections of account lives were reasonably accurate.

... However, petitioner's followup study tracked accounts that transferred from the [a]cquired [b]anks into any of the branches of petitioner within the State. The actual closures, taking into account these transfers, were substantially the same as the projections of petitioner. . . .

... Petitioner's projections . . . were also corroborated by the actual closures. . . .

... Moreover, the validity of petitioner's estimates was corroborated by the actual closures.

*Id.*

162. *Id.* at 505.

163. *Id.*

164. *See AmSouth Bancorp. v. United States*, 681 F.2d 698, 712 (N.D. Ala. 1988).

165. *Commissioner v. Killian*, 314 F.2d 852, 855 (5th Cir. 1963) (quoting *Nelson Weaver Realty Co. v. Commissioner*, 307 F.2d 897, 901 (5th Cir. 1962)).

166. *Boe v. Commissioner*, 307 F.2d 339, 343 (9th Cir. 1962).

a purchaser of a going concern may acquire goodwill where the "transfer enables the purchaser 'to step into the shoes of the seller.'"<sup>167</sup>

"The chief elements of . . . goodwill are continuity of place and continuity of name."<sup>168</sup> An entity builds up its goodwill, in part, by establishing itself and surviving long enough in the marketplace. Goodwill also includes a business' advantageous location,<sup>169</sup> the reputation of the business entity through the customer's eye,<sup>170</sup> and the competitive edge inherent in a business.<sup>171</sup> These nebulous characteristics make it difficult to define goodwill with precision.<sup>172</sup> If goodwill is viewed in light of the business entity as a whole, however, and not as a discrete asset, the boundaries of the asset become apparent.

Goodwill attaches to the business when the individual assets work as a unit.<sup>173</sup> Generally, goodwill has no value in and of itself, and the purchaser cannot acquire goodwill apart from the underlying assets of the business.<sup>174</sup> A business cannot sell off its goodwill and retain the productive elements of

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167. *Balthrope v. Commissioner*, 356 F.2d 28, 32 n.1 (5th Cir. 1966) (quoting *Masquelette's Estate v. Commissioner*, 239 F.2d 322, 325 (5th Cir. 1956)).

168. 38 AM. JUR. 2D *Good Will* § 4 (1968) (footnote omitted).

169. *Id.* § 5.

170. *See id.* § 6.

171. *Id.* § 7. "Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. Such expectancy may come from succession in place or name or otherwise to a business that has won the favor of its customers. It is then known as good will." 15 MERTEN, *supra* note 81, § 59.56 n.93 (quoting *In re Brown*, 242 N.Y. 1, 150 N.E. 581 (1926) (citation omitted)).

172. *See* 15 MERTEN, *supra* note 81, § 59.56 n.93. "Efforts by different courts and legal writers to frame an adequate definition [of goodwill] have resulted in a legion of concepts ranging widely in degrees of complexity." *Id.* (quoting Wright, *Nature and Basis of Legal Good Will*, 24 ILL. L. REV. 20, 20 (1929)).

173. Going concern value is distinguishable from goodwill. Going concern value is, in essence, the additional element of value which attaches to property by reason of its existence in a going concern. *Conestoga Transp. Co. v. Commissioner*, 17 T.C. 506, 514 (1951). The theory behind going concern value is that a business, even in the absence of goodwill, will continue to generate earnings without interruption after a change in ownership. *See, e.g., Winn-Dixie Montgomery, Inc. v. United States*, 444 F.2d 677, 685 n.12 (5th Cir. 1971); *Computing & Software, Inc. v. Commissioner*, 64 T.C. 223, 235 (1975). While some courts have stated that the difference between goodwill and going concern value is merely technical, the better view is that going concern value is a broader concept, with goodwill usually representing a substantial portion of going concern value. *See supra* note 6. The main point with respect to going concern value is that, as with goodwill, it does not have a determinable useful life and is nondepreciable.

174. 38 AM. JUR. 2D *Good Will* § 3 (1968) ("it has no existence as property in and of itself, as a separate and distinct entity, but only as an incident of a continued business"); *cf.* 15 MERTEN, *supra* note 81, § 59.59 n.28 ("It is not necessarily true that the goodwill of a business cannot be transferred apart from any tangible assets.").

the business, except in rare cases.<sup>175</sup> The impact of goodwill not only affects the price of the business as a whole, however, but also affects the value of the individual assets.

The fact that a business has substantial goodwill will increase the value of individual assets because an asset currently in use will garner a higher price in the market than an idle asset.<sup>176</sup> This increase in value does not prohibit the purchaser from depreciating the asset merely because a portion of the asset's value is attributable to goodwill.<sup>177</sup> The distinction must be made between an asset that is inextricably linked to goodwill and an asset whose value is enhanced by the goodwill of the entity. The former is afforded no depreciation deduction, while the latter is depreciable. If, in the latter case, goodwill impacts upon the value of the individual assets, and if the cost of the asset attributable to goodwill is nondepreciable, then the purchaser must adjust the fair market value of all purchased assets to reflect the fair value of the asset in a nongoing concern, or in a similar entity with little or no goodwill.<sup>178</sup>

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175. A nonpersonal service business may sell a portion of its goodwill by franchising out its name. If the entity has a reputable and well recognized trade name, then it may transfer goodwill if the customers need only see the trade name, and they will patronize the establishment. 15 MERTEN, *supra* note 81, § 59.59 n.28; *see also* 38 AM JUR. 2D *Good Will* § 6 (1968). Because this issue does not arise in the case of core deposits, it is beyond the scope of this Comment.

176. This is due to the fact that a productive asset is worth more to the seller than a nonproductive one. The seller will hold out for a higher price, forcing the buyer to raise his bid or look elsewhere for a comparable asset.

177. The calculation of the depreciation deduction is based upon the asset's adjusted basis as provided in section 1011 of the Internal Revenue Code. I.R.C. § 167(g) (West Supp. 1990). Section 1011 provides that the asset's adjusted basis is its section 1012 cost basis as adjusted by section 1016. I.R.C. § 1011 (West Supp. 1990). The focus, therefore, becomes what the asset cost the taxpayer, not whether any portion of that cost is due to goodwill.

178. For example, consider a machine operated in a going concern with considerable goodwill. The fair market value of a similar machine that is idle might be worth \$100. Because the asset is more productive in the going concern, the seller would require a sales price of \$110 for the individual asset. In addition, if the purchaser desired to purchase the entire business, he must pay, because the seller would demand, a price above the sum total of the value of the individual assets. Therefore, the purchaser may finally pay \$115 for the asset. If the asset is denied a depreciation deduction because a *portion* of the asset's value is attributable to goodwill, then the purchaser must recalculate and reduce the asset's value to reflect its value in a nongoing concern.

In a business purchase transaction, the last five dollar increment in the above hypothetical is usually readily quantifiable and is consequently treated as goodwill. In contrast, the ten dollar increment from \$100 to \$110 usually is not readily quantifiable. More importantly, the question is whether the law requires that the total cost of the asset be separate and distinct from goodwill. If so, then no depreciation deduction for the entire \$115 asset is allowed. If the law requires only that the asset be separate and distinct for valuation purposes, however, then the \$110 is an asset separate and distinct from goodwill, thereby satisfying the first require-

The purchaser must adjust the fair market value to separate out the depreciable and nondepreciable portions of the asset's cost. The court in *Citizens & Southern* properly concluded that neither the Code nor the regulations require such a result.<sup>179</sup> The court required only that the core deposit base be separate and distinct from goodwill for valuation purposes. After establishing such an independent value, a court must then inquire into what portion of that value has a limited useful life.

Therefore, one must contrast the characteristics of the deposit base intangible with the characteristics of goodwill to determine whether the core deposit intangible is inextricably linked to goodwill. The court should consider in this analysis that the goodwill of an entity will affect the valuation of the deposit base intangible. This does not preclude a depreciation deduction for the intangible asset, however, once the purchaser demonstrates that the deposit base intangible has a limited useful life.<sup>180</sup>

## B. Characteristics of the Core Deposit Base

### 1. Future Income

The deposit base intangible's main characteristic is future income. When a bank acquires another bank, it knows approximately how long the acquired depositors will keep their deposited funds on deposit with the bank.<sup>181</sup> The bank bases its estimate on its past experience.<sup>182</sup> The bank will derive a benefit from these funds in the nature of income, generated in future years, by calculating the differential between the earnings on these deposits and the cost of these funds to the bank.<sup>183</sup> The seller, aware of this fact, will build the discounted value of that benefit into its asking price. The acquiring bank "purchases" the future income, and the deposit base intangible represents the purchaser's cost of the discounted value of the future income stream.

This purchase of future income can be distinguished from goodwill. The deposit base intangible represents future income relating to one individual component part of the business entity: the acquired core deposits. In con-

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ment for depreciability. The issue thus becomes how much, if any, of the remaining \$110 has a limited useful life.

179. See *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 500 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990); see also *id.* at 516 (Cohen, J., concurring).

180. See *supra* notes 176-78 and accompanying text.

181. See *Citizens & Southern*, 91 T.C. at 505.

182. *Id.*; see also *supra* note 130.

183. See *supra* note 130.

trast, goodwill generally relates to a premium inherent in the total business entity that operates as a unit.<sup>184</sup>

Admittedly, the depositor's relationship with a bank falls within the "old customers returning to the old place" language so often quoted as a definition of goodwill.<sup>185</sup> The court, however, has frequently held that intangible assets, such as subscription and customer lists, are amortizable despite the fact that a portion of their value is related to continued patronage.<sup>186</sup> The separate and distinct analysis represents a facts and circumstances test, wherein no one factor is determinative.

## 2. Severability of the Core Deposit Base from the Business Entity

Core deposits are a discrete component of a bank and are severable from the bank's business as a whole.<sup>187</sup> As in *Midlantic*, courts inquire into an asset's severability when considering whether the asset is in the nature of goodwill.<sup>188</sup> Because goodwill generally is transferred only upon the sale of the entire business,<sup>189</sup> then if the taxpayer can transfer the asset individually, one can argue that the asset is not akin to goodwill. Pure deposit assumption transactions, transactions in which the purchaser acquires only the bank's core deposits, *do* occur frequently in the banking industry.<sup>190</sup> In such cases, when the purchaser acquires only core deposits, it leaves behind the

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184. See *supra* notes 173-75 and accompanying text.

185. See *supra* notes 165-66 and accompanying text.

186. See, e.g., *Panichi v. United States*, 834 F.2d 300, 301-02 (2d Cir. 1987) (the court held that the customer list acquired was an asset separate from the going concern with a determinable useful life and was therefore depreciable); *Donrey, Inc. v. United States*, 809 F.2d 534 (8th Cir. 1987) (taxpayer permitted to amortize subscription list acquired in the purchase of a going concern); *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1246-1247 (5th Cir. 1973) (taxpayer permitted amortization deduction for subscription list after court found that the asset had a limited useful life of ascertainable duration), *cert. denied*, 414 U.S. 1129 (1974); *Super Food Serv., Inc. v. United States*, 416 F.2d 1236, 1240 (7th Cir. 1969) (court repudiated mass asset doctrine and permitted taxpayer to take an amortization deduction for acquired franchise contracts on a showing of a limited useful life).

187. See *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 492 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

188. See *Winn-Dixie Montgomery, Inc. v. United States*, 444 F.2d 677, 679-80 (5th Cir. 1971); *Marsh & McLennan, Inc. v. Commissioner*, 420 F.2d 667, 668-70 (3d Cir. 1969); *Golden State Towel & Linen Serv., Ltd. v. United States*, 373 F.2d 938, 940-41 (Ct. Cl. 1967); *Boe v. Commissioner*, 307 F.2d 339, 343 (9th Cir. 1962). *But see Citizens & Southern*, 91 T.C. at 493 (holding that separate transferability is not required in order to establish that the deposit base has a value separate and distinct from goodwill).

189. See *supra* notes 173-75 and accompanying text.

190. See, e.g., *AmSouth Bancorp. v. United States*, 681 F. Supp. 698, 708 (N.D. Ala. 1988); accord *Citizens & Southern*, 91 T.C. at 492. Pure deposit assumption transactions occur when the deposit liabilities of a bank are acquired without acquiring any of the bank's other assets or liabilities. *Citizens & Southern*, 91 T.C. at 492.

trade name of the former bank, its operating structure, physical assets, and any goodwill.

In transactions involving the transfer of multiple assets, a group of which are similar in nature to goodwill, courts have applied the mass asset rule<sup>191</sup> and denied the depreciation deductions claimed for these assets with characteristics similar to goodwill.<sup>192</sup> Generally, courts refuse to apply the mass asset doctrine where the assets individually have a separate value that can be readily identified.<sup>193</sup> In the case of the core deposit intangible, when a taxpayer sufficiently carries its burden of proof, the court can separately quantify the value of the asset, rendering the mass asset rule inapplicable. Therefore, the severability of the deposit base intangible from the business entity, coupled with the lack of support for the mass asset rule, supports a holding that the deposit base intangible is separate and distinct from goodwill.

### 3. *The Terminable at Will Nature of the Core Deposit Base is Not Dispositive*

One characteristic of the core deposit intangible, to which goodwill is linked, is its terminable at will nature.<sup>194</sup> The Commissioner argues that because depositors may withdraw their funds at any time, the bank has acquired only an expectancy of continued patronage, which is the hallmark of goodwill.<sup>195</sup> While several court holdings applied this rationale,<sup>196</sup> most of these cases were decided upon evidentiary failures on the part of the taxpayers.<sup>197</sup> To sustain a depreciation deduction, a taxpayer must demonstrate that the deposit base intangible has a value separate and distinct from the overall goodwill of the acquired bank.

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191. See *supra* note 138.

192. See *Thriftcheck Serv. Corp. v. Commissioner*, 33 T.C. 1038, 1047 (1960) (the acquisition should be treated as the purchase of a single asset that does not exhaust over time, but rather as one which has a continuing useful life), *aff'd*, 287 F.2d 1 (2d Cir. 1961); *cf.* *Super Food Serv., Inc. v. United States*, 416 F.2d 1236, 1239 (7th Cir. 1969) (the "mass asset doctrine has recently been subject to strong criticism" and the court did not apply the doctrine where the taxpayer had individually valued the assets in question).

193. See, e.g., *Commissioner v. Seaboard Fin. Co.*, 367 F.2d 646, 652 (9th Cir. 1966); *Laird v. U.S.*, 556 F.2d 1224, 1232-33 (5th Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978).

194. See *supra* note 141 and accompanying text.

195. See *supra* text accompanying notes 164-66.

196. *Sunset Fuel Co. v. United States*, 519 F.2d 781 (9th Cir. 1975); *Skilken v. Commissioner*, 420 F.2d 266 (6th Cir. 1969), *aff'g*, 50 T.C. 902 (1968); *Imperial News Co. v. United States*, 576 F. Supp. 865 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1434 (2d Cir. 1984); *General Television, Inc. v. United States*, 449 F. Supp. 609 (1978), *aff'd*, 598 F.2d 1148 (8th Cir. 1979).

197. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 482 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990); *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1249 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974).

In addition, the terminable at will nature of core deposits impacts upon the requirement that an amortizable intangible must have a limited useful life.<sup>198</sup> When balancing the issue of whether the deposit base intangible is separate and distinct from goodwill, courts should consider the taxpayer's proof as to the intangible's limited useful life. This is due to the theory behind nonamortizability of goodwill: Goodwill is a nonwasting asset, the life of which the taxpayer cannot reasonably determine. If the taxpayer can demonstrate that the deposit base intangible has a limited useful life, the court should give less weight to the threshold question of whether it is an asset separate and distinct from goodwill.

#### 4. *The Overall Balance of the Characteristics of the Core Deposit Base*

On balance, the question whether the core deposit intangible is separate and distinct from goodwill is uncertain. The deposit base intangible represents, at least partially, continued patronage and the notion that customers return to familiar places.<sup>199</sup> Core deposits are severable, however, from the business entity, which negates the characteristic of goodwill that it attaches to the entity as a whole and emanates from the individual assets working as a unit.<sup>200</sup> In addition, the acquired bank may merge with the acquiring bank, thereby changing the acquired bank's name and location. This type of transaction destroys the characteristics of goodwill relating to continuity of name and place.<sup>201</sup> Moreover, the fact that a *portion* of the intangible's value reflects goodwill is not determinative of the question whether the asset is separate and distinct from goodwill as a *whole*.<sup>202</sup>

The more important question in resolving the debate over the depreciability of the deposit base intangible is whether the taxpayer has established that the asset has a limited useful life.<sup>203</sup> The rationale behind holding goodwill nondepreciable is that this asset is nonwasting and lacks a determinable useful life.<sup>204</sup> The core deposit base intangible, however, possesses none of these characteristics.

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198. See *supra* text accompanying note 143.

199. Compare *supra* text accompanying notes 185-86 with text accompanying notes 164-67.

200. Compare *supra* text accompanying notes 173-75 with text accompanying notes 187-90.

201. See *supra* text accompanying notes 168-70.

202. See *supra* note 178 and text accompanying notes 176-79.

203. See *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 516 (1988) (Cohen, J., concurring) ("It seems to me that the requirement that an asset be separate and distinct means only that it must have a measurable value for a specific use."), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

204. See *supra* notes 36-38 and accompanying text.

#### IV. COMMENT: LOOKING TO THE DEPOSIT BASE INTANGIBLE'S LIMITED USEFUL LIFE

##### A. *Establishing the Limited Useful Life*

Section 1.167(a)-1(b) of the Treasury regulations provides that a taxpayer may establish the useful life of an asset for depreciation based upon its experience with similar property or the general experience of the industry.<sup>205</sup> Courts have held that the issue of whether the asset has a useful life is a question of fact, which the court will decide based upon the record.<sup>206</sup>

Courts have determined that the core deposit intangible is a wasting asset.<sup>207</sup> In *Midlantic*, the Tax Court analyzed the useful life of the bank's deposit base.<sup>208</sup> *Midlantic* demonstrated that a portion of the acquired depositors would leave their bank based upon historical data.<sup>209</sup> Therefore, because the record indicated with reasonable accuracy that between ten and fifteen percent of *Midlantic's* purchased deposit accounts would close each year, the court concluded that *Midlantic* proved the useful life of its core deposit base.<sup>210</sup>

The *Citizens & Southern* court also had no difficulty in determining that the bank sustained its burden of proof with respect to the useful life of the core deposit base.<sup>211</sup> The court noted that the analysts, engaged to determine the asset's useful life, performed detailed analysis.<sup>212</sup> The resulting reports revealed that the acquired core deposits steadily decreased and would eventually be eliminated and replaced by *Citizens & Southern's* own internally generated core deposits.<sup>213</sup>

Even though the *Midlantic* and *Citizens & Southern* courts determined that the deposit base intangible had a limited useful life, courts must recognize that the Code and the regulations only require a "reasonable" approximation of the intangible's limited useful life.<sup>214</sup> If a taxpayer can

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205. Treas. Reg. § 1.167(a)-1(b) (as amended in 1972).

206. *Houston Chronicle Publishing Co. v. Commissioner*, 481 F.2d 1240, 1245-47 (1973), *cert. denied*, 414 U.S. 1129 (1974).

207. *AmSouth Bancorp. v. United States*, 681 F. Supp. 698, 714 (N.D. Ala. 1988); *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 500-05 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990); *accord Midlantic Nat'l Bank v. Commissioner*, 46 T.C.M. 1464, 1474 (1983).

208. *Midlantic*, 46 T.C.M. at 1471-75.

209. *Id.* at 1474-75.

210. *Id.* at 1475.

211. *Citizens & Southern*, 91 T.C. at 500-05.

212. *Id.* at 468-73; *see also supra* note 130 and accompanying text.

213. *Citizens & Southern*, 91 T.C. at 499.

214. I.R.C. § 167(a) (West Supp. 1990); Treas. Reg. § 1.167(a)-3 (as amended in 1960); *see also supra* notes 7, 9.

demonstrate through historical data that the deposit base is a wasting asset, the court should allow a depreciation deduction. In addition, although the determination of the asset's useful life must occur as of the end of the tax year,<sup>215</sup> courts should review the total record before them, including any post acquisition studies. For example, in *Citizens & Southern*, the court found the post acquisition studies further supported Citizens & Southern's claim that the core deposit intangible had a limited useful life.<sup>216</sup> Courts should not close their eyes to evidence of the deposit base intangible's useful life by holding the asset nonamortizable as a matter of law. Instead, courts should apply the same standard they would apply to similar intangible assets: a facts and circumstances standard.<sup>217</sup>

### B. *A Comparison of the Core Deposit Base to Other Amortizable Intangibles*

Courts have held that the core deposit base is similar to several intangible assets that are amortizable, such as subscription lists, insurance expirations, and customer lists.<sup>218</sup> A review of these rulings lends support to a holding that the deposit base is amortizable.

#### 1. *Subscription Lists*

Subscription lists include the names, addresses, and personal information of customers or subscribers to a particular publication.<sup>219</sup> These lists are similar to the deposit base in that their value is based in part on the customers' willingness to retain or renew their subscriptions.<sup>220</sup> Additionally, both core deposits and the subscriptions are terminable at will.<sup>221</sup>

215. See *supra* note 86 and text accompanying notes 86-90.

216. *Citizens & Southern*, 91 T.C. at 502-05; see also *Super Foods Serv., Inc. v. Commissioner*, 416 F.2d 1236, 1240 (9th Cir. 1969) (evidence of petitioner's subsequent experience, however, is acceptable to corroborate its projections); *supra* note 161 and accompanying text.

217. See generally *infra* text accompanying notes 222-25, 231, 235-38.

218. See, e.g., *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240 (5th Cir. 1973), *cert. denied*, 414 U.S. 1129 (1974); *Panichi v. United States*, 834 F.2d 300 (2d Cir. 1987); *Donrey, Inc. v. United States*, 809 F.2d 534 (8th Cir. 1987); *Union Bankers Ins. Co. v. Commissioner*, 64 T.C. 807 (1975); *Manhattan Co. v. Commissioner*, 50 T.C. 78 (1968).

219. BLACK'S LAW DICTIONARY 1280 (5th ed. 1979); see *Donrey, Inc. v. United States*, 809 F.2d 534, 535-36 (8th Cir. 1987) (the value of the subscription list is equal to the "present value of the difference in advertising revenues generated by the subscription list as compared to the revenues of an equivalent paper without a subscription list").

220. Similarly, a portion of the value of the deposit base relates to the depositors' willingness to keep their funds in the bank. See *supra* note 140.

221. The subscriber is generally not bound to renew its subscription. Once the term of the subscription has expired, the subscriber may decide not to renew the subscription, letting the subscription lapse. The purchaser of the subscription list will use the list to solicit a continuation of the current subscription and will attempt to sell additional subscriptions. For a discus-

Despite the fact that the subscription list represents a relationship involving the notion of continued patronage, which is similar to goodwill<sup>222</sup> and the core deposit intangible,<sup>223</sup> courts have held that these factors are not an absolute bar to depreciability.<sup>224</sup> Rather, courts have determined that the relevant inquiry is whether the taxpayer has proven that the subscription list has a limited useful life capable of reasonable estimation through sufficiently competent evidence.<sup>225</sup> This analysis similarly applies to the deposit base intangible.

## 2. Insurance Expirations

Insurance expirations are "the files of an insurance agency indicating a policyholder's insurance coverage, types of policies, and the beginning and termination dates of the present policies in force."<sup>226</sup> The purchaser of insurance policy expiration lists has access to valuable policyholder information.<sup>227</sup> This information is necessary to contact the policyholder for the purpose of soliciting continued or future patronage.<sup>228</sup> As time passes, the lists become outdated and worthless because of changes in policyholder data.

These lists are similar to goodwill and the deposit base intangible because the value of the lists represents a potential future income stream. In addition, insurance expirations are terminable at will, similar to the core deposit intangible.<sup>229</sup> The insured can permit a policy to lapse, thereby terminating the business relationship at will, just as the depositor can demand its money from the bank at any time. Moreover, the insurance expiration lists are severable from general insurance company business, a factor which is similar to

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sion of the terminable at will nature of the deposit base intangible, see *supra* text accompanying notes 140-42, 145-50.

222. See *supra* text accompanying notes 165-66.

223. See *supra* text accompanying note 185.

224. *Panichi v. United States*, 834 F.2d 300, 301-02 (2d Cir. 1987) (taxpayer acquired customer list and court found asset amortizable because the list had a discrete value with a discernable life span of fifteen years); *Donrey, Inc. v. United States*, 809 F.2d 534 (8th Cir. 1987) (taxpayer permitted to amortize the value assigned to a subscription list in the purchase of a going concern); *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1245-51 (5th Cir. 1973) (the taxpayer purchased a subscription list and engaged valuation engineers that established a five year useful life), *cert. denied*, 414 U.S. 1129 (1974).

225. *Houston Chronicle*, 481 F.2d at 1249.

226. *Tomlinson v. Commissioner*, 507 F.2d 723, 725 n.1 (9th Cir. 1974); Rev. Rul. 65-180, 1965-2 C.B. 279.

227. The list is valuable until the individual's current policy lapses, or until the time at which the holder cancels his current policy, whichever is earlier. The agent can solicit the policyholder as his current policy nears expiration and a short time thereafter.

228. *Decker v. Commissioner*, 864 F.2d 51, 52 (7th Cir. 1988).

229. *Compare* *Union Bankers Ins. Co. v. Commissioner*, 64 T.C. 807, 811-17 (1975) with *supra* notes 140-42 and accompanying text.

the core deposits' severability from the bank's other business.<sup>230</sup> In sum, courts have upheld the amortization deduction for insurance expiration lists, where the taxpayer has sustained the burden of proving that the list has a distinct value apart from goodwill and a limited useful life.<sup>231</sup>

### 3. Customer Lists

Like subscription lists, customer lists detail the personal information of a particular business' patrons.<sup>232</sup> The history of the amortization of customer lists parallels that of the deposit base. In early cases, courts addressing the amortizability of customer lists held that the lists were not amortizable because they had an unlimited useful life.<sup>233</sup> Later, courts recognized the asset as an indivisible part of a bundle of "mass assets" not subject to depreciation.<sup>234</sup> Once courts became familiar with the nature of customer lists and the use of these lists in the business community, however, courts retreated from their hard line position.<sup>235</sup>

Currently, most courts reject the Commissioner's application of a per se rule of nonamortizability to customer lists when there is a portion of the purchase price of the list that has a limited useful life.<sup>236</sup> Courts assert that no logical reason exists to prevent the allocation of the purchase price of the customer list among its depreciable and nondepreciable portions<sup>237</sup> once a taxpayer has established a separate value for the asset apart from goodwill. Where there is a separate and distinct value apart from goodwill, the analysis shifts to determining what amount, if any, has a limited useful life. Courts have properly exercised their judgment with respect to the depreciability of the customer list<sup>238</sup> and should properly extend the same rationale to the deposit base intangible because to disallow an amortization deduction for such assets, under circumstances similar to *Citizens & Southern*, "would be the one completely wrong conclusion."<sup>239</sup>

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230. Compare *Union Bankers*, 64 T.C. at 840 with *supra* notes 187-90 and accompanying text.

231. See, e.g., *Union Bankers*, 64 T.C. at 807; *Richard Miller & Sons, Inc. v. United States*, 537 F.2d 446, 449 (Ct. Cl. 1976).

232. *Manhattan Co. v. Commissioner*, 50 T.C. 78, 80-81 (1968).

233. See, e.g., *Anchor Cleaning Serv., Inc. v. Commissioner*, 22 T.C. 1029 (1954).

234. See, e.g., *Thriftcheck Serv. Corp. v. Commissioner*, 33 T.C. 1038 (1960). Courts have since held that the mass asset rule is not a per se rule of nonamortizability. See *supra* note 138.

235. *Manhattan Co.*, 50 T.C. at 93-94 (1968).

236. *Panichi v. United States*, 834 F.2d 300, 301-02 (2d Cir. 1987); *Donrey, Inc. v. United States*, 809 F.2d 534, 536-37 (8th Cir. 1987); *ABCO Oil Corp. v. Commissioner*, 58 T.C.M. (CCH) 1280, 1283 (1990).

237. *Manhattan Co.*, 50 T.C. at 91.

238. *Id.* at 93.

239. See *id.*

This brief look at other intangible assets demonstrates that courts are willing to recognize that a number of intangible assets are amortizable. As the regulations provide, goodwill is the only intangible asset that is nonamortizable as a matter of law.<sup>240</sup> The courts should continue to look to the underlying rationale behind the mandate for holding goodwill nondepreciable and apply this rationale to each new case claiming a depreciation deduction for an intangible asset. In particular, courts should apply the rationale that nonwasting assets are nondepreciable and focus on whether a taxpayer has sufficiently demonstrated the "wasting" of the intangible asset.

*C. The Judicial Spotlight is on the Asset's Limited Useful Life*

The court in *Citizens & Southern* did not hold that the core deposit base is separate and distinct from goodwill as a matter of law.<sup>241</sup> At least one legal commentator, however, contends that such a determination is the "real" issue behind the depreciability of the core deposit intangible.<sup>242</sup> Considering the "facts and circumstances" in assessing the depreciation deduction for the core deposit base, the *Citizens & Southern* court was correct in not applying a per se rule to resolve the issue. The Code does not state that taxpayers may take a deduction for property used in a trade or business that has a limited useful life *and* is separate and distinct from goodwill.<sup>243</sup> Rather, the Code provides an allowance for depreciation for property used in a trade or business that will exhaust over time, or that is subject to obsolescence.<sup>244</sup>

The requirement frequently followed by courts, that an intangible asset must be separate and distinct from goodwill in order to qualify for a depreciation deduction, is not in the Code.<sup>245</sup> The concept of an asset's separate and distinct nature, however, is useful to the courts. Specifically, the language is helpful in determining whether the asset in question is so similar to goodwill that a court cannot allow a depreciation deduction because of its indeterminable useful life. Courts must recognize, however, that simply because an asset may have some "indicia" of goodwill, the asset should not be denied depreciability.

Courts are correct in putting the spotlight on the proof offered by the taxpayer with respect to the asset's useful life, rather than focusing more heavily on whether the deposit base is separate and distinct from goodwill as

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240. See Treas. Reg. § 1.167(a)-3 (as amended in 1960); see also *supra* note 9.

241. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 500 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

242. Blasi, *supra* note 17, at 5.

243. See I.R.C. § 167(a) (West Supp. 1990); see also *supra* note 7.

244. I.R.C. § 167(a) (West Supp. 1990); see also *supra* note 7.

245. See I.R.C. § 167(a) (West Supp. 1990); see also *supra* note 7.

a matter of law. Once the court determines that the asset is separate and distinct from goodwill for valuation purposes, the depreciation analysis shifts to ascertaining the asset's value that is subject to depreciation. More precisely, once the taxpayer satisfies the threshold analysis that the intangible in question has a separate value apart from any goodwill, the court should inquire into what specific portion of the asset's cost has a limited useful life.

Applying this rationale to the core deposit base, it is evident that the core deposit intangible has a separate value apart from goodwill.<sup>246</sup> The core deposit intangible represents future income derived from reinvesting the acquired core deposits less the associated costs relating to these deposits.<sup>247</sup> This value is related solely to the acquired core deposits and is a separate component of the purchase price. The value assigned to the core deposit base is distinguishable from the value of the overall goodwill of the acquired banks. The purchaser calculates overall goodwill acquired in the purchase after it determines the sum total of all the individual asset values, which includes the value of the deposit base intangible. Under this analysis, the core deposit base intangible has a value separate and distinct from goodwill, thereby satisfying the threshold question.

The limited useful life analysis focuses the depreciation analysis toward the mandates of the Code. The threshold determination as to the asset's separateness from goodwill properly excludes from the class of depreciable intangible assets any asset that is so akin to goodwill that any inquiry into the asset's useful life is futile. The core deposit intangible is not such an asset.

In cases such as *Citizens & Southern*, where the taxpayer performs a detailed analysis as to an asset's value, uses this valuation in determining its purchase price for the business, and allocates a significant portion of the purchase price to goodwill,<sup>248</sup> there is no justification for denying a depreciation deduction with respect to the core deposit base. The taxpayer fulfills the requirements for a section 167 deduction when it develops a strong factual and evidentiary position as to the value of the deposit base and its limited useful life.

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246. *Citizens & Southern*, 91 T.C. at 500.

247. *See supra* note 130.

248. *Citizens & Southern*, 91 T.C. at 469 (the taxpayer allocated \$10,496,372 to goodwill/going concern value based upon the residual method).

## V. CONCLUSION

The Internal Revenue Code sets forth a two part test for depreciation of assets.<sup>249</sup> First, the taxpayer must use the asset in a trade or business or hold the asset for the production of income.<sup>250</sup> Second, the taxpayer must use the asset for only a limited period of time.<sup>251</sup> The burden of proof is upon the taxpayer to prove by sufficient evidence both of these factors.<sup>252</sup>

The regulations set forth the test regarding the depreciation of intangible assets.<sup>253</sup> The taxpayer must show that the intangible asset is used in the business for only a limited period of time, which the taxpayer must measure with reasonable accuracy.<sup>254</sup> In addition, the regulations provide that a depreciation deduction will not be allowed with respect to goodwill.<sup>255</sup>

The case law sets forth a two part test as to the depreciability of intangible assets: The asset must be separate and distinct from goodwill and must have a limited useful life.<sup>256</sup> The deposit base intangible has characteristics similar to goodwill, such as a relationship based upon continued patronage.<sup>257</sup> The deposit base intangible is distinguishable from goodwill, however, in that it is severable from the business entity<sup>258</sup> and it lacks "continuity of place and name."<sup>259</sup> In addition, the fact that goodwill may impact upon a *portion* of the asset's value does not render the asset as a *whole* not separate and distinct from goodwill.<sup>260</sup> Lastly, a comparison of the core deposit intangible to similar intangibles that courts have found depreciable lends further support to a holding that the core deposit intangible is separate and distinct from goodwill. Thus, on balance, the deposit base intangible has a value separate and distinct from goodwill.

The rationale behind the depreciation deduction requires courts to focus on the asset's limited useful life.<sup>261</sup> Therefore, the question is not whether the deposit base intangible is goodwill. Rather, the question is whether the deposit base has a limited useful life. Through detailed valuation reports

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249. I.R.C. § 167(a) (West Supp. 1990); *see also supra* note 7.

250. I.R.C. § 167(a) (West Supp. 1990).

251. *Id.*

252. *Welch v. Helvering*, 290 U.S. 111 (1933).

253. Treas. Reg. § 1.167(a)-3 (as amended in 1960); *see also supra* note 9.

254. Treas. Reg. § 1.167(a)-3 (as amended in 1960).

255. *Id.*

256. *Citizens & Southern Corp. v. Commissioner*, 91 T.C. 463, 479 (1988), *aff'd without opinion*, 900 F.2d 266 (11th Cir. 1990).

257. *Compare supra* text accompanying note 166 with text accompanying note 185.

258. *Compare supra* text accompanying notes 173-75 with text accompanying notes 187-90.

259. *Compare supra* text accompanying note 168 with text accompanying note 190.

260. *See supra* note 178 and text accompanying notes 176-78.

261. *See supra* text accompanying notes 36-38, 203-04.

and a collection of historical data describing the account lives of the core deposits, the taxpayer can carry its burden of proof as to the deposit base intangible's limited useful life. Even though the deposit base intangible has certain indicia of goodwill, if the taxpayer demonstrates that the intangible has a limited useful life, it has met the requirements of the Code and the court must uphold a depreciation deduction with respect to the core deposit intangible.

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