Part III

Administrative, Procedural, and Miscellaneous

26 CFR 1.168(k)-1: Additional first year depreciation deduction.
(Also: §§ 38, 41, 52, 53, 168, 6401)

Rev. Proc. 2008-65

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 3081 of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008) (Housing Act). Section 3081(a) of the Housing Act amends § 168(k) of the Internal Revenue Code by adding § 168(k)(4), allowing corporations to elect not to claim the 50-percent additional first year depreciation for certain new property acquired after March 31, 2008, and placed in service generally before January 1, 2009, and instead to increase their business credit limitation under § 38(c) or alternative minimum tax (AMT) credit limitation under § 53(c). This revenue procedure clarifies the rules regarding the effects of making the § 168(k)(4) election, the property eligible for the election, and the computation of the amount by which the business credit limitation and AMT credit

limitation may be increased if the election is made. The Internal Revenue Service (IRS) and Treasury Department intend to publish future guidance regarding the time and manner for making the § 168(k)(4) election, for allocating the credit limitation increases allowed by the election, and for making the election to apply § 3081(b) of the Housing Act by certain automotive partnerships, and regarding the procedures applicable to partnerships with corporate partners that make the § 168(k)(4) election (see § 168(k)(4)(G)(ii)).

SECTION 2. BACKGROUND

.01 Section 168(k), amended by § 103 of the Economic Stimulus Act of 2008, Pub. L. No. 110-185, 122 Stat. 613 (February 13, 2008) (Stimulus Act), allows a 50-percent additional first year depreciation deduction (Stimulus additional first year depreciation deduction) for certain new property acquired by a taxpayer after 2007 and placed in service by the taxpayer before 2009 (before 2010 in the case of property described in § 168(k)(2)(B) or (C)).

.02 Section 3081(a) of the Housing Act added § 168(k)(4) to the Code. If a corporation elects to apply § 168(k)(4), § 168(k)(4)(A) provides that, for the corporation's first taxable year ending after March 31, 2008, and for any subsequent taxable year, the corporation forgoes the Stimulus additional first year depreciation deduction allowable under § 168(k) for eligible qualified property placed in service by the taxpayer and increases each of the limitations described in § 38(c) (relating to the general business credit) and § 53(c) (relating to the AMT credit). As a result, the corporation will be able to claim unused credits from taxable years beginning before

January 1, 2006, that are allocable to research expenditures or AMT liabilities. This revenue procedure clarifies which depreciable property is eligible qualified property (see section 3 of this revenue procedure) and clarifies the effects of making the election to apply § 168(k)(4) (see section 4 of this revenue procedure).

.03 Section 38(c)(1) limits the general business credit allowed under § 38(a) to the excess (if any) of the taxpayer's net income tax (generally, the sum of the taxpayer's regular tax liability and AMT liability less certain credits) over the greater of (i) the tentative minimum tax for the taxable year or (ii) 25 percent of so much of the taxpayer's net regular tax liability (generally, the taxpayer's regular tax liability less certain credits) as exceeds $25,000. Under § 38(b)(4), the general business credit includes the research credit determined under § 41. Section 53(c) provides that the amount of the minimum tax credit allowed for any taxable year shall not exceed the excess (if any) of the regular tax liability of the taxpayer (reduced by certain credits) over the tentative minimum tax for the taxable year. In general, a taxpayer that makes the election to apply § 168(k)(4) increases the limitations under §§ 38(c) and 53(c) by the bonus depreciation amount. In general, the amount by which the bonus depreciation amount increases each of the credit limitations under §§ 38(c) and 53(c) is determined by the portion of the bonus depreciation amount that the taxpayer allocates to each credit limitation for the taxable year. This revenue procedure clarifies the computation of the bonus depreciation amount (see section 5 of this revenue procedure) and the limitations on a taxpayer's allocation of the bonus depreciation amount between §§ 38(c) and 53(c) (see section 6 of this revenue procedure).

.04 To the extent that a taxpayer is allowed the business credit or AMT credit in an amount allocable to the aggregate increases in the business credit limitation and the AMT credit limitation that result from the § 168(k)(4) election, such amount(s) are treated as overpayments within the meaning of § 6401(b) that are refundable to the taxpayer. See § 168(k)(4)(F).

.05 Section 168(m), added by § 308(a) of the Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, __ Stat. __ (October 3, 2008), allows a 50-percent additional first year depreciation deduction for qualified reuse and recycling property placed in service after August 31, 2008. Section 168(n), added by § 710(a) of the Heartland Disaster Tax Relief Act of 2008, Pub. L. No. 110-343, __ Stat. __ (October 3, 2008), allows a 50-percent additional first year depreciation deduction for qualified disaster assistance property placed in service after December 31, 2007, with respect to federally declared disasters occurring after 2007 and before 2010. Both new Code provisions provide that property described in such provisions does not include property to which § 168(k) applies. Therefore, eligible qualified property for which a taxpayer makes the § 168(k)(4) election does not qualify for the 50-percent additional first year depreciation deduction allowed under § 168(m) and (n).

SECTION 3. ELIGIBLE QUALIFIED PROPERTY

.01 In General. With the exception of revised dates, eligible qualified property for purposes of § 168(k)(4) is qualified property under § 168(k)(2). Consequently, the property must be placed in service by the taxpayer before January 1, 2009. See § 168(k)(4)(D)(i) and (k)(2)(A)(iv). The placed-in-service-date deadline is extended to

before January 1, 2010, for property that meets the requirements of § 168(k)(2)(B) (long production period property) and property that meets the requirements of § 168(k)(2)(C) (certain aircraft). See § 168(k)(4)(D)(i) and (k)(2)(A)(iv). Pursuant to section 5.01 of Rev. Proc. 2008-54, 2008-38 I.R.B. 722, 723, rules similar to the rules in § 1.168(k)-1 of the Income Tax Regulations for "qualified property" or for "30-percent additional first year depreciation deduction" apply for determining whether depreciable property is qualified property under § 168(k)(2).

.02 Application of Revised Dates. In applying § 168(k)(2) to determine whether depreciable property is eligible qualified property for purposes of § 168(k)(4), § 168(k)(4)(D)(i) provides that "March 31, 2008" is substituted for "December 31, 2007" each place it appears in § 168(k)(2)(A) and § 168(k)(2)(E)(i) and (ii). Accordingly, the affected requirements of § 168(k)(2) are modified as follows for determining whether depreciable property that is qualified property under § 168(k)(2) also is eligible qualified property for purposes of § 168(k)(4):

(1) Original use of the property commences with the taxpayer after March 31, 2008. Section 168(k)(4)(D)(i) and (k)(2)(A)(ii);

(2) The property (a) is acquired by the taxpayer after March 31, 2008, and before January 1, 2009, but only if no written binding contract for the acquisition was in effect before January 1, 2008, or (b) is acquired by the taxpayer pursuant to a written binding contract which was entered into after March 31, 2008, and before January 1, 2009. Section 168(k)(4)(D)(i) and (k)(2)(A)(iii). However, see section 3.03 of this revenue procedure for an exception to this rule;

(3) In the case of a taxpayer manufacturing, constructing, or producing property for the taxpayer's own use, the requirements of section 3.02(2) of this revenue procedure are treated as met if the taxpayer begins manufacturing, constructing, or producing the property after March 31, 2008, and before January 1, 2009. Section 168(k)(4)(D)(i) and (k)(2)(E)(i); and

(4) If new property is originally placed in service by a person after March 31, 2008, and is sold to a taxpayer and leased back to the person by the taxpayer within three months after the date the property was originally placed in service by the person, the taxpayer-lessor is considered the original user of the property under section 3.02(1) of this revenue procedure and, for purposes of the placed-in-service date requirement in § 168(k)(2)(A)(iv), the property is treated as originally placed in service by the taxpayer-lessor not earlier than the date on which the property is used by the lessee under the leaseback. Section 168(k)(4)(D)(i) and (k)(2)(E)(ii); see also § 1.168(k)-1(b)(3)(iii)(A) and (b)(5)(ii)(A).

.03 Passenger Aircraft. For passenger aircraft, the binding contract requirement in § 168(k)(2)(A)(iii)(I) does not apply for determining whether the passenger aircraft is eligible qualified property. Section 168(k)(4)(G)(iii). Accordingly, a passenger aircraft is eligible qualified property if the aircraft is acquired by the taxpayer (1) after March 31, 2008, and before January 1, 2009, or (2) pursuant to a written binding contract entered into after March 31, 2008, and before January 1, 2009 (assuming all other requirements for qualified property under § 168(k)(2) are met).

SECTION 4. SECTION 168(k)(4) ELECTION

.01 In General. Except as provided in § 3081(b) of the Housing Act (relating to certain automotive partnerships), only a corporation may elect to apply § 168(k)(4). This election is made by the corporate taxpayer for its first taxable year ending after March 31, 2008. If the election to apply § 168(k)(4) is made, the election applies to all eligible qualified property placed in service by the taxpayer in the taxpayer's first taxable year ending after March 31, 2008, and in any subsequent taxable year. Even if a taxpayer does not place in service any eligible qualified property in its first taxable year ending after March 31, 2008, the taxpayer must make the election to apply § 168(k)(4) for that taxable year if it wishes to apply the election to eligible qualified property placed in service in a subsequent taxable year.

.02 Controlled Group of Corporations. All corporations which are treated as a single employer under § 52(a) (generally any controlled group of corporations within the meaning of § 1563(a), determined by substituting "more than 50 percent" for "more than 80 percent" each place it appears in that section) shall be treated as one taxpayer for purposes of § 168(k)(4) and as having elected to apply § 168(k)(4) if any such corporation so elects. Section 168(k)(4)(C)(iv). For example, if the common parent of an affiliated group of corporations filing a consolidated return makes the election to apply § 168(k)(4) for one member of the affiliated group, then all members of the affiliated group are treated as one taxpayer for purposes of § 168(k)(4) and as having made the election.

.03 Applicable Depreciation Method. If a taxpayer elects to apply § 168(k)(4), the

applicable depreciation method under § 168(b) for all eligible qualified property is the straight line method. Section 168(k)(4)(A)(ii).

.04 Ordering Rules for Applying Elections under § 168(k). Under § 168(k), there are two elections: the election not to claim the Stimulus additional first year depreciation for all property in a particular class of property (see § 168(k)(2)(D)(iii)) and the election to apply § 168(k)(4) for all eligible qualified property. If a taxpayer makes both elections, the taxpayer applies § 168(k)(2)(D)(iii) first. Any class of property (as defined in § 1.168(k)-1(e)(2)) for which a § 168(k)(2)(D)(iii) election has been made is not qualified property under § 168(k)(2) nor eligible qualified property under § 168(k)(4). For example, if a calendar-year taxpayer for its taxable year ending December 31, 2008, makes the election to apply § 168(k)(4) and also elects not to claim the Stimulus additional first year depreciation deduction for 7-year property, the taxpayer first applies § 168(k)(2)(D)(iii) to all of its 7-year property acquired and placed in service in 2008. All eligible qualified property (excluding the 7-year property) will be included in the taxpayer's § 168(k)(4) election.

.05 Time and Manner for Making Election. The IRS and Treasury intend to publish separate guidance on the time and manner of making the election.

.06 Revocation of Election. Once made, the election to apply § 168(k)(4) may be revoked only with the written consent of the Commissioner of Internal Revenue. See § 168(k)(4)(G)(i). To seek the Commissioner's consent, the taxpayer must submit a request for a letter ruling. See Rev. Proc. 2008-1, 2008-1 I.R.B. 1 (or any successor).

SECTION 5. BONUS DEPRECIATION AMOUNT

01. In General. Except as limited by section 5.03, the bonus depreciation amount for any taxable year is equal to 20 percent of the excess (if any) of --

(1) the aggregate amount of depreciation that would be allowable under § 168 for eligible qualified property placed in service by the taxpayer during the taxable year if the Stimulus additional first year depreciation deduction applied to all such property, over

(2) the aggregate amount of depreciation that would be allowable under § 168 for eligible qualified property placed in service by the taxpayer during the taxable year if the Stimulus additional first year depreciation deduction did not apply to any such property. Section 168(k)(4)(C)(i)(I) and (II).

.02 Special Rules for Determining Bonus Depreciation Amount. For purposes of sections 5.01(1) and (2) of this revenue procedure, the following rules apply:

(1) The aggregate amounts of depreciation computed under sections 5.01(1) and (2) of this revenue procedure are made without regard to any election made under § 168(b)(2)(C) (relating to the 150 percent declining balance method), § 168(b)(3)(D) (relating to the straight line method election), § 168(g)(7) (relating to the alternative depreciation system election), and the requirement under section 4.03 of this revenue procedure that eligible qualified property must be depreciated using the straight line method if the taxpayer makes the election to apply § 168(k)(4). Section 168(k)(4)(C)(i).

(2) If a corporation makes the election to apply § 168(k)(4) and is a partner in a partnership, property placed in service by the partnership is not taken into account in

determining the corporation's aggregate amounts of depreciation computed under sections 5.01(1) and (2) of this revenue procedure.

(3) The applicable convention rules under § 168(d) (including the mid-quarter convention for property placed in service during the last three months of a taxable year) apply in determining the aggregate depreciation amounts under sections 5.01(1) and (2) of this revenue procedure.

(4) For passenger aircraft, the binding contract requirement in § 168(k)(2)(A)(iii)(I) does not apply for determining the aggregate depreciation amount under section 5.01(1) of this revenue procedure. Section 168(k)(4)(G)(iii). Accordingly, for determining the aggregate depreciation amount under section 5.01(1) of this revenue procedure, a passenger aircraft is taken into account if the aircraft is acquired by the taxpayer (1) after March 31, 2008, and before January 1, 2009, or (2) pursuant to a written binding contract entered into after March 31, 2008, and before January 1, 2009 (assuming all other requirements for qualified property under § 168(k)(2) are met).

(5) With respect to long production period property, only the adjusted basis of such property attributable to manufacture, construction, or production after March 31, 2008, and before January 1, 2009, is taken into account in determining the aggregate depreciation amounts under sections 5.01(1) and (2) of this revenue procedure. Section 168(k)(4)(D)(ii). The amounts of adjusted basis of the property attributable to manufacture, construction, or production after March 31, 2008, and before January 1, 2009, are referred to as "progress expenditures." For purposes of determining progress expenditures under this section 5.02(5), rules similar to the rules in section 4.02(1)(b) of

Notice 2007-36, 2007-17 I.R.B. 1000, 1001 (relating to progress expenditures for GO Zone extension real property), apply.

.03 Maximum Amount. The bonus depreciation amount for any taxable year shall not exceed the maximum increase amount (as computed under section 5.04 of this revenue procedure) reduced (but not below zero) by the sum of the bonus depreciation amounts determined under § 168(k)(4)(C) for all preceding taxable years. Section 168(k)(4)(C)(i) and (ii).

.04 Maximum Increase Amount. For purposes of section 5.03 of this revenue procedure, the maximum increase amount for any taxpayer means the lesser of (1) $30,000,000, or (2) 6 percent of the sum of the business credit increase amount (as computed under section 5.05 of this revenue procedure) and the AMT credit increase amount (as computed under section 5.06 of this revenue procedure). Section 168(k)(4)(C)(iii)(I) and (II).

.05 Business Credit Increase Amount. The business credit increase amount means the portion of the credit allowable under § 38 (without regard to § 38(c)) for the first taxable year ending after March 31, 2008, that is allocable to business credit carryforwards to such taxable year that are (1) from taxable years beginning before January 1, 2006, and (2) properly allocable (considering the application of § 38(d) to credits used in prior taxable years) to the research credit determined under § 41(a). Section 168(k)(4)(E)(iii). For purposes of this section 5.05, a business credit carryforward allocable to the research credit that was from a taxable year beginning before January 1, 2006, but has expired before the first taxable year ending after March

31, 2008, is not taken into account in determining the business credit increase amount.

.06 AMT Credit Increase Amount. The AMT credit increase amount means the portion of the minimum tax credit under § 53(b) for the first taxable year ending after March 31, 2008, determined by taking into account only the adjusted minimum tax for taxable years beginning before January 1, 2006. Section 168(k)(4)(E)(iv). For purposes of this section 5.06, minimum tax credits shall be treated as allowed on a first-in, first-out basis. Section 168(k)(4)(E)(iv).

SECTION 6. ALLOCATION OF BONUS DEPRECIATION AMOUNTS

.01 In General. Except as limited by section 6.02 of this revenue procedure, the taxpayer shall specify the portion (if any) of the bonus depreciation amount for the taxable year that is to be allocated to each of the business credit limitation under § 38(c) and the AMT credit limitation under § 53(c).

.02 Limitation on Allocations.

(1) For any taxable year, the portion of the bonus depreciation amount that may be allocated to the business credit limitation under § 38(c) shall not exceed the excess of the business credit increase amount (determined under section 5.05 of this revenue procedure) over the bonus depreciation amount allocated by the taxpayer to such limitation for all preceding taxable years.

(2) For any taxable year, the portion of the bonus depreciation amount that may be allocated to the AMT credit limitation under § 53(c) shall not exceed the excess of the AMT tax credit increase amount (determined under section 5.06 of this revenue procedure) over the bonus depreciation amount allocated by the taxpayer to such

limitation for all preceding taxable years.

.03 Time and Manner for Specifying Allocation. The IRS and Treasury intend to publish separate guidance on the time and manner for specifying the allocation.

.04 Example. Y, a calendar-year corporation, makes the election to apply § 168(k)(4) for its taxable year ending December 31, 2008. Because § 168(k)(4) was not available prior to 2008, Y has no bonus depreciation amounts (as defined in § 168(k)(4)(C)) for preceding taxable years. Assume that (1) under section 5.01 of this revenue procedure, Y's bonus depreciation amount is $100 million, (2) under section 5.05 of this revenue procedure, Y's business credit increase amount is $10 million, and (3) under section 5.06 of this revenue procedure, Y's AMT credit increase amount is $590 million. Consequently, under section 5.04 of this revenue procedure, Y's maximum increase amount is $30 million (the lesser of (1) $30 million and (2) .06 X ($10 million + $590 million), or $36 million). Therefore, under section 5.03 of this revenue procedure, Y's bonus depreciation amount that may be allocated to increase the credit limitations under §§ 38(c) and 53(c) is $30 million. Pursuant to section 6.01 of this revenue procedure, as limited by section 6.02 of this revenue procedure, the portion of the bonus depreciation amount ($30 million) that Y allocates to the credit limitation under § 38(c) is $10 million (the maximum amount that Y may allocate to its § 38(c) credit limitation under section 6.02(1) of this revenue procedure) and the portion of the bonus depreciation amount that Y allocates to the credit limitation under § 53(c) is $20 million.

In addition, during its taxable year ending December 31, 2009, Y places in

service long production period property or certain aircraft that is eligible qualified property. Y's 2008 § 168(k)(4) election remains in effect. For the 2009 taxable year, assume that (1) under section 5.01 of this revenue procedure, Y's bonus depreciation amount is $100 million and (2) under section 5.04 of this revenue procedure, Y's maximum increase amount is $30 million. Therefore, under section 5.03 of this revenue procedure, Y's bonus depreciation amount for the taxable year ending December 31, 2009, is $0 ($30 million (maximum increase amount) less $30 million (the bonus depreciation amount that Y allocated to increase its §§ 38(c) and 53(c) credit limitations for 2008)).

SECTION 7. EFFECTIVE DATE

This revenue procedure is effective October 10, 2008.

SECTION 8. DRAFTING INFORMATION

The principal author of this revenue procedure is Jeffrey T. Rodrick of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure contact Jeffrey T. Rodrick on (202) 622-4930 (not a toll free call).