

PUBLICATION

IRS Proposes New Regulations for Bonus Depreciation Deduction

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The Tax Cuts and Jobs Act (TCJA) expanded bonus first-year depreciation for qualifying property up to 100 percent of the adjusted basis of the property (the Bonus Depreciation Deduction). On August 3, 2018, the U.S. Department of Treasury provided proposed regulations on the Bonus Depreciation Deduction (BDD). This Tax Alert addresses the primary requirements of qualifying for the BDD.

Section 168(k) allows for the BDD for certain qualifying property. Prior to the TCJA, Section 168(k) permitted an additional 50 percent depreciation deduction in the first year of service for certain qualifying property. Section 13201 of the TCJA replaced the outright 50 percent bonus depreciation with an "applicable percentage" schedule, the first phase of which provides for 100 percent bonus depreciation for property placed in service after September 27, 2017, but before January 1, 2023.

Eligibility Requirements

The proposed regulations provide guidance on the eligibility requirements for and calculation of the BDD. According to the proposed regulations, the taxpayer must meet the following requirements to qualify for the BDD:

1. The property subject to depreciation must be of a certain type;
2. The taxpayer must be the first user of the acquired property, or must have had no prior interest in used acquired property;
3. The taxpayer must have placed the property in service in a specified time period; and
4. The taxpayer must have acquired the property after September 27, 2017.

Property of a Specified Type

The previous version of Section 168(k) limited the types of property that would qualify for the BDD. The TCJA expanded the scope of qualifying property, and the proposed regulations designate the following seven types of property:

- MACRS property with a recovery period of 20 years or fewer
- Certain computer software
- Water utility property
- Certain building improvements
- Film and television productions
- Live theatrical productions
- Certain vegetation and plants (in some cases)

New and Used Property

To qualify under the prior version of Section 168, the "original use" of the property in question must have begun with the taxpayer. The TCJA expanded the original use requirement to property that "was not used by the taxpayer at any time prior to [its] acquisition," thus allowing used property to fall in Section 168(k)'s ambit. The proposed regulations clarify this expansion by promulgating alternative tests under this requirement, both of which examine who first began using the depreciable property. The "original use" test requires that the "first

use" of the property commence with the taxpayer. The "original use" includes expenditures to recondition or rebuild property the taxpayer owns.

Alternatively, used property can meet this requirement under the "used property" test. Generally, the used property test requires that the taxpayer (or its predecessor) did not use the property prior to its acquisition and that certain related party, basis, and cost requirements are met. A taxpayer is deemed to have used property prior to its acquisition if the taxpayer (or its predecessor) had depreciable interest in the property prior to its acquisition, regardless of whether the taxpayer (or its predecessor) claimed depreciation deductions. The proposed regulations do not specify the look back period for determining if a taxpayer (or its predecessor) had a depreciable interest in the property; however, the Department of Treasury and IRS are soliciting comments for such a period and related safe harbor.

Placed In Service Date

Section 168(k), as amended by the TCJA, requires that the property subject to bonus depreciation be placed in service by the taxpayer before January 1, 2027, a significant extension beyond the January 1, 2020 date in the prior version. The proposed regulations further clarify the "placed in service" requirement by permitting retroactive application of amended section 168(k) back to September 27, 2017.

Generally, property is considered "placed in service" under the proposed regulations on the date the taxpayer first uses the property in his or her trade or business or in the production of income. Additionally, the proposed regulations provide guidance on determining the "placed in service" dates for specific types of property. For example, film and television productions are considered "placed in service" at time of their initial release or broadcast, and theatrical productions are deemed "placed in service" at the time of the initial live staged performance.

Date of Acquisition

The proposed regulations also require that the taxpayer acquire the depreciable property after September 27, 2017. A taxpayer is deemed to satisfy the "acquired" requirement if the taxpayer is in a binding contract for the property. Qualifying property constructed by the taxpayer is deemed to meet the acquisition requirement if construction began after September 27, 2017.

The proposed regulations also address special situations involving certain partnership transactions; like-kind exchanges and involuntary conversions; property placed in service and disposed of in the same tax year; and many other specialized topics.

The proposed regulations are not final and are subject to a statutorily required notice and comment period, during which the public will have the opportunity to comment on the proposed regulations. Therefore, the proposed regulations may change before they become final. However, the proposed regulations provide that a taxpayer may choose to apply the proposed regulations to qualified property acquired and placed in service after September 27, 2017.

Please remember that advice and counsel regarding your particular tax related issues, including the potential impact of the developments outlined above, are dependent on your specific facts and circumstances. For more information about how these issues may affect you, your business, or related matters, please contact any of the members of Baker Donelson's [Tax Group](#).