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OF THE
UNITED STATES OF AMERICA

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October 2, 2018

Office of Associate Chief Counsel (Income Tax & Accounting)
Attention: Elizabeth R. Binder
Internal Revenue Service (I.R.S.)
1111 Constitution Avenue, NW.
Washington, DC 20224

Via Federal eRulemaking Portal

RE: Comments on REG-104397-18 (Proposed Rules Relating to §168(k)[1] Additional First Year Depreciation Deduction)

Dear Ms. Binder:

The U.S. Chamber of Commerce appreciates the opportunity to provide feedback on REG-104397-18, the proposed rules relating to accelerated depreciation as published in the *Federal Register* on August 8, 2018. While the Chamber generally supports the approach of these proposed rules, we do have concerns with the self-constructed property provisions of Prop. Regs. §1.168(k)-2. While, at this time, this is the sole concern of our members with the proposed regulations, other members may share additional issues outside of this comment letter.

Overview and Discussion

To address the substantial changes made to §168(k) by the Tax Cuts and Jobs Act ("TCJA"), the proposed regulations add a new regulatory section, Prop. Regs. §1.168(k)-2, for property acquired and placed in service after September 27, 2017. Regs. §1.168(k)-1 generally remains applicable for property acquired prior to September 28, 2017. Consistent with the relevant effective date section in the TCJA, the proposed regulations indicate that only property acquired after September 27, 2017, qualifies for 100% bonus depreciation (or the phased down rates in later years, as applicable). For purposes of determining when property is acquired, the relevant effective date section of the TCJA provides that property will not be treated as acquired any later than the date on which the taxpayer enters into a written binding contract to acquire

[1] Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

such property. As the TCJA language did not expressly state that the written binding contract language should apply to property constructed, manufactured, or produced by the taxpayer and property constructed, manufactured, or produced by a third-party contractor on the taxpayer's behalf, taxpayers were not expecting the proposed regulations to change the current acquisition date requirement related to these assets.

The proposed regulations take the position that property that is manufactured, constructed or produced for the taxpayer by another person under a written binding contract that is entered into prior to the manufacture, construction or production of the property is treated as acquired pursuant to a written binding contract. This is a complete departure from the rules under Regs. §1.168(k)-1(b)(4)(iii), which indicate that such property is treated as self-constructed by the taxpayer themselves and not subject to the written binding contract rules (instead allowing taxpayers to treat such property as acquired when manufacture, construction or production begins). Accordingly, this means that a taxpayer that entered into a written binding contract with a third-party contractor prior to September 28, 2017, to construct property on its behalf will not be eligible to claim 100% bonus depreciation on such property, even if construction begins after September 27 (as such property will be subject to the §168(k) provisions in effect prior to the amendments made by the TCJA). Therefore, the proposed regulations' interpretation of the TCJA's language regarding written binding contract is a surprising and unsupported interpretation of the statutory language. Furthermore, the proposed regulations would completely change the law, by no longer treating property manufactured, constructed, or produced by a third-party on behalf of a taxpayer as property manufactured, constructed, or produced by the taxpayer. The TCJA statutory language does not support this change and nothing in the legislative history suggests that Congress intended to make this change. Where, such as here, the statute is silent or leaves a question unanswered, the agency tasked with implementing the statute may give a "reasonable construction" in addressing the issue.[2] Further, where that provision is a part of a taxing statute, "such laws are to be interpreted liberally in favor of the taxpayers."[3] It is not reasonable to interpret the TCJA's silence related to self-constructed assets constructed by a third-party as a wholesale departure from the current rules treating these assets the same as if they were constructed by the taxpayer.

As a result of the interpretation presented in the proposed regulations, if companies make substantial investments in projects that are manufactured, constructed, or produced by third parties, these investments would be subject to the more limiting "binding contract" ("BC") provisions instead of the current "self-constructed" property provisions and the related

[2] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, rehearing denied, 468 U.S. 1227 (1984).

[3] *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927). This precedent has withstood the test of time. *See Murphy v. Internal Revenue Service*, 493 F. 3d 170, 179 (D.C. Cir. 2007) (the court, indicating that there was no ambiguity, nevertheless noted that "we have no occasion to apply the canon favoring the interpretation of ambiguous revenue-raising statutes in favor of the taxpayer."), *cert. denied*, 553 U.S. 1004 (2008).

provisions under Rev. Proc. 2011-26[4] for the "Component Election" that were put in place to appropriately deal with these types of assets and whose provisions were not intended to be changed by the TCJA.

The preamble to the proposed regulations[5] provides that "[b]ecause of the clear language of §13201(h)(1) of the Act regarding written binding contracts, the proposed regulations also provide that property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract that is entered into prior to the manufacture, construction, or production of the property…is acquired pursuant to a written binding contract." Based on this rationale, the proposed regulations[6] depart from prior §168(k) regulations[7] with respect to self-constructed property by redefining the 'acquisition date' for such assets that are governed by a "written binding contract" to recast that date back to the signature date of the document. This interpretation is perplexing, as the TCJA did not, in fact, place added emphasis on the concept of a "written binding contract" over the previous legislation. Rather, in §168(k)(2)(B)(i)(III), the only reference made to the "written binding contract," was unchanged as a result of the Act, aside from an update to the date.

Given that there was no specific emphasis made with respect to this concept, it is unclear as to why the Secretary would depart from the previous guidance on the treatment of self-constructed assets for §168(k) purposes, namely determination of the acquisition date when a "written binding contract" is present. This guidance, most certainly, is not a liberal interpretation of the law "in favor of the taxpayer."[8] In fact, changing the acquisition date for self-constructed assets results in some taxpayers not even being able to qualify for current bonus depreciation on investment choices. This is clearly an unintended consequence and does not align with the stated goals of trying to incentivize more investment. Instead, the provision has the effect of increasing the cost on previously committed capital since many companies based their investment decisions assuming the continuation of 50% expensing which had been in effect for the last 10 years. This increase in the cost on previously committed capital limits capital budgets for post-September 27, 2017 qualifying investments. Further, these proposed rules also increase compliance burdens, again resulting in less investment and a misalignment with the stated intent.[9]

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[4] 2011-16 I.R.B. 664 (Mar. 9, 2011).
[5] *See* Preamble to REG-104397-18, 83 FR 39292, 39297 (Aug. 8, 2018).
[6] Prop. Regs. §1.168(k)-2(b)(5)(iv)(A).
[7] *See* prior Regs. §1.168(k)-1(b)(4)(iii)(A).
[8] *See supra*, footnote 7.
[9] See Tax Cuts And Jobs Act, "Report of The Committee On Ways And Means House Of Representatives On H.R. 1," Rpt. 115–409, 115th Congress, 1st Sess. At 232 (Nov. 13, 2017), stating:

> The Committee believes that providing full expensing for certain business assets lowers the cost of capital for tangible property used in a trade or business. With lower costs of capital, the Committee believes that businesses will be encouraged to purchase equipment and other assets, which will promote capital investment and provide economic growth. The Committee also believes that full expensing for certain business assets will eliminate depreciation recordkeeping requirements for such assets.

In contrast, for taxpayer-constructed property, the proposed regulations retain the self-constructed property rules of Regs. §1.168(k)-1(b)(4(iii), which provide that property is acquired when the taxpayer begins manufacturing, constructing, or producing the property, and further provides a safe harbor that permits a taxpayer to determine the acquisition date as the date on which more than 10% of the total cost of the property has been incurred.

The proposed regulations also provide rules specific to components of self-constructed property (largely leveraging the component rules provided in Regs. §1.168(k)-1(b)(4)(iii)(C)). If a binding contract to acquire one or more components of a larger self-constructed property is entered into before September 28, 2017, the acquired component is not eligible for 100% bonus depreciation; however, such acquisition will not preclude the larger self-constructed property from satisfying the acquisition rules. However, if the manufacture, construction, or production of the larger self-constructed property begins before September 28, 2017, the larger self-constructed property and any acquired components related to the larger self-constructed property do not qualify for 100% bonus depreciation, regardless of when the component is acquired.

Similarly, if a taxpayer begins manufacturing, constructing or producing a component of a larger self-constructed property before September 28, 2017, this will not preclude the larger self-constructed property from satisfying the acquisition rules. However, if the manufacture, construction, or production of the larger self-constructed property begins before September 28, 2017, the larger self-constructed property and any self-constructed components do not qualify for bonus depreciation, regardless of when the component is acquired.

Solution

To remedy the unsupported change in the proposed regulations of the acquisition date for self-constructed property manufactured, constructed, or produced by a third-party on behalf of a taxpayer proposed, the Chamber recommends revising the proposed regulations to provide that property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business (or for its production of income) is considered to be manufactured, constructed, or produced by the taxpayer. Essentially, the Chamber recommends treating such self-constructed property exactly as it is currently treated under current Reg. §1.168(k)-1(b)(4)(iii) as neither the statutory language nor the legislative history support the proposed change. Additionally, the proposed regulations should be revised to make clear that the rules provided for in Rev. Proc. 2011-26 related to component part elections and the identification of a component of a larger asset for 100-percent bonus depreciation purposes are all still relevant and will apply to components of self-constructed property solely for the purposes of determining whether the components are eligible for 100-percent bonus depreciation.

Conclusion

The Chamber appreciates the opportunity to engage with you as we work to ensure implementation of tax reform is done in the most business-friendly manner possible. As such, we strongly urge you to revisit your position on the treatment under §168(k) of self-constructed assets acquired from third parties to ensure these regulations are as consistent with Congressional intent to drive investment and growth as possible. We look forward to working with you on this matter.

Sincerely,

Caroline L. Harris

CC: David J. Kautter, Assistant Secretary, Office of Tax Policy, United States Department of the Treasury

Hon. Charles P. Rettig, Commissioner, Office of the Commissioner, Internal Revenue Service, United States Department of the Treasury

William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service

Thomas C. West, Tax Legislative Counsel, Office of Tax Policy, U.S. Department of the Treasury