Part III. Administrative, Procedural, and Miscellaneous

Modification of Notice 2008–40; Deduction for Energy Efficient Commercial Buildings

Notice 2012–26

SECTION 1. PURPOSE

This notice modifies Notice 2006–52, 2006–1 C.B. 1175, and Notice 2008–40, 2008–1 C.B. 725, which clarified and amplified Notice 2006–52. This notice sets forth additional guidance relating to the deduction for energy efficient commercial buildings under § 179D and is intended to be used with Notice 2006–52 and Notice 2008–40.

On June 26, 2006, the Service published Notice 2006–52, which provides, among other things, the requirements for achieving a partial deduction under the permanent rule for (1) interior lighting systems, (2) heating, cooling, ventilation, and hot water systems, and (3) the building envelope. Specifically, Notice 2006–52 requires that for a partial deduction (other than a deduction under the interim lighting rule described below), the system must reduce the total annual energy and power costs with respect to the combined usage of the building's heating, cooling, ventilation, hot water, and interior lighting systems by at least a specified percentage as compared to a Reference Building that meets the minimum requirements of Standard 90.1–2001[1] (the energy savings percentages). The energy savings percentages prescribed in Notice 2006–52 were $16^2/_3$ percent for each of the three systems.

On April 7, 2008, the Service published Notice 2008–40, which provided alternative energy savings percentages that taxpayers could use to qualify for the partial deduction under the permanent rule. The energy savings percentages provided in Notice 2008–40 are 10 percent for the building envelope and 20 percent for interior lighting systems and heating, cooling, ventilation, and hot water systems.

This notice provides an additional set of energy savings percentages that taxpayers may use to qualify for a partial deduction under the permanent rule.

SECTION 2. BACKGROUND

Section 1331, Title XIII of the Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (Aug. 8, 2005), enacted § 179D of the Code, which provides a deduction with respect to energy efficient commercial buildings. As originally enacted, § 179D applied to property placed in service after January 1, 2006 and before January 1, 2008. Section 204, Div. A, Title II of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, 120 Stat. 2922 (Dec. 20, 2006), extended the § 179D deduction to apply to property placed in service before January 1, 2009. Section 303, Div. B, Title III of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3845 (October 8, 2008), further extended the § 179D deduction to apply to property placed in service before January 1, 2014.

Section 179D(a) allows a deduction to a taxpayer for part or all of the cost of energy efficient commercial building property that the taxpayer places in service. Section 179D(c)(1) defines "energy efficient commercial building property" as depreciable property that satisfies each of the following conditions: (1) the property is installed on or in any building that is located in the United States and is within the scope of Standard 90.1–2001; (2) the property is installed as part of the interior lighting systems; the heating, cooling, ventilation, and hot water systems; or the building envelope; and (3) it is certified that the interior lighting systems, heating, cooling, ventilation, and hot water systems, and the building envelope that have been incorporated into the building, or that the taxpayer plans to incorporate into the building subsequent to the installation of such property, will reduce the total annual energy and power costs with respect to the combined usage of the building's heating, cooling, ventilation, hot water, and interior lighting systems by 50 percent or more as compared to a Reference Building that meets the minimum requirements of Standard 90.1–2001.

Section 179D(b) provides that the maximum amount of the § 179D deduction shall not exceed the excess (if any) of (i) the product of $1.80 and the square footage of the building, over (ii) the aggregate amount of the § 179D deductions allowed with respect to the building for all prior taxable years.

In the event that the installation of energy efficient commercial building property does not achieve the 50-percent reduction in total annual energy and power costs required by § 179D(c)(1)(D), § 179D(d)(1) provides for a partial deduction, in an amount not to exceed the product of $0.60 and the square footage of the building, for each system that satisfies the requirements § 179D(d)(1) (the permanent rule). While the taxpayer may claim a partial § 179D deduction for each system, the taxpayer may not claim partial deductions that in total exceed the overall limitation of (i) the product of $1.80 and the square footage of the building, over (ii) the aggregate amount of the § 179D deductions allowed with respect to the building for all prior taxable years.

Section 179D(f) provides an interim lighting rule, which is an alternate method of calculating a partial deduction for interior lighting systems. This rule provides a partial deduction for part or all of the cost of certain energy efficient commercial building property installed as part of a lighting system that reduces the lighting power density of the building by more than 25 percent (50 percent in the case of a warehouse).

SECTION 3. CHANGES RELATING TO PARTIALLY QUALIFYING PROPERTY

Under the permanent rule, property that would be energy efficient commercial building property but for the failure to achieve the target 50-percent reduction in energy and power costs required under § 179D(c)(1)(D) is partially qualifying commercial building property if it is in-

[1] Any reference in this notice to Standard 90.1–2001 should be treated as a reference to ANSI/ASHRAE/IESNA Standard 90.1–2001, Energy Standard for Buildings Except Low-Rise Residential Buildings, developed for the American National Standards Institute by the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America (as in effect on April 2, 2003, including addenda 90.1a–2003, 90.1b–2002, 90.1c–2002, 90.1d–2002, and 90.1k–2002 as in effect on that date).

stalled as part of a system that satisfies the applicable energy savings percentage.

.01 *Energy Savings Percentages Provided in Notice 2006–52*. Section 2.03(1)(a) of Notice 2006–52 provides that property installed as part of the interior lighting system is partially qualifying property under the permanent rule if the installation of such property will reduce the total annual energy and power costs with respect to the combined usage of the building's heating, cooling, ventilation, hot water, and interior lighting systems by 16⅔ percent or more as compared to a Reference Building that meets the minimum requirements of Standard 90.1–2001. Notice 2006–52 provides an identical rule for heating, cooling, ventilation and hot water systems in section 2.04(1), and for the building envelope in section 2.05(1). Thus, the applicable energy savings percentage under Notice 2006–52 is 16⅔ percent for each of the three systems.

.02 *Energy Savings Percentages Provided in Notice 2008–40*. Section 7.01 of Notice 2008–40 provides that when calculating a partial deduction for the building envelope, a taxpayer may apply section 2.05 of Notice 2006–52 by substituting "10" for "16⅔" in section 2.05(1) of such notice. However, a taxpayer that makes this substitution must apply sections 2.03 (relating to the partial deduction for interior lighting systems) and 2.04 (relating to the partial deduction for heating, cooling, ventilation, and hot water systems) of Notice 2006–52 by substituting "20" for "16⅔" in section 2.03(1)(a) and section 2.04(1) of such notice, respectively. Thus, the alternative energy savings percentages permitted under Notice 2008–40 are 20 percent for the interior lighting system and the heating, cooling, ventilation, and hot water systems, and 10 percent for the building envelope.

Section 7.01 of Notice 2008–40 also provides that if § 179D is extended beyond December 31, 2008, taxpayers should use these updated energy savings percentages to determine whether property placed in service after December 31, 2008, is partially qualifying property. Accordingly, the energy savings percentages provided in Notice 2006–52 (16⅔ for each system) may not be used to determine whether property placed in service after December 31, 2008, is partially qualifying property.

.03 *Energy Savings Percentages Provided in Current Notice*. Under this notice, when calculating a partial deduction for heating, cooling, ventilation, and hot water systems, a taxpayer may apply section 2.04 of Notice 2006–52 by substituting "15" for "16⅔" in section 2.04(1) of such notice. However, a taxpayer that makes this substitution must apply section 2.03 of Notice 2006–52 (relating to the partial deduction for interior lighting systems) by substituting "25" for "16⅔" in section 2.03(1)(a) of such notice, and must apply section 2.05 of Notice 2006–52 (relating to the partial deduction for the building envelope) by substituting "10" for "16⅔" in section 2.05(1) of such notice. Thus, the applicable energy savings percentages permitted under this notice are 25 percent for the interior lighting system, 15 percent for the heating, cooling, ventilation, and hot water systems, and 10 percent for the building envelope.

The energy savings percentages permitted under this notice are available for property placed in service on or after the effective date of this notice. If § 179D is extended beyond December 31, 2013, the Internal Revenue Service and the Treasury Department expect, in the absence of other changes to § 179D, that the substitute energy savings percentages set forth in this notice will be the only energy savings percentages used in determining whether property placed in service after December 31, 2013, is partially qualifying property. Until December 31, 2013, taxpayers may use either the energy savings percentages provided in section 7.01 of Notice 2008–40 or the substitute energy savings percentages provided under this notice.

Notwithstanding the foregoing provisions of this section 3.03 or any other provision of this notice, if a taxpayer claims or previously claimed a partial deduction with respect to a commercial building under Notice 2006–52 or Notice 2008–40 and the system for which the deduction is or was claimed does not satisfy the applicable energy savings percentage specified for such system in this section 3.03, the taxpayer may not claim a partial deduction for any other system in the same building using the energy savings percentages permitted under this section 3.03.

The following table summarizes the energy savings percentages permitted under Notice 2006–52, Notice 2008–40 and this notice.

Summary of Energy Savings Percentages Provided by IRS Guidance

	Energy Savings Percentages permitted under Notice 2006–52	Energy Savings Percentages permitted under Notice 2008–40	Energy Savings Percentages permitted under Notice 2012–26
Interior Lighting Systems	16⅔	20	25
Heating, Cooling, Ventilation, and Hot Water Systems	16⅔	20	15

Building Envelope	16⅔	10	10
Effective for property placed in service	January 1, 2006 – December 31, 2008	January 1, 2006 – December 31, 2013	Effective date of Notice 2012–26 – December 31, 2013; if § 179D is extended beyond December 31, 2013, also effective (except as otherwise provided in an amendment of § 179D or the guidance thereunder) during the period of the extension

.04 *Limitation on Deduction for Partially Qualifying Property*.

(1) *In General*. A taxpayer who owns, or is a lessee of, a commercial building and installs partially qualifying energy efficient commercial building property may claim a partial deduction for each system that meets the requirements provided in sections 2.03, 2.04 and 2.05 of Notice 2006–52 (as modified by Notice 2008–40 and this notice). However, because the deduction for each such system is limited to $0.60 per square foot, the sum of all partial § 179D deductions claimed cannot exceed the excess (if any) of (i) the product of $1.80 and the square footage of the building, over (ii) the aggregate amount of the § 179D deductions allowed with respect to the building for all prior taxable years.

(2) *Application to Multiple Taxpayers*. If two or more taxpayers install property on or in the same building and the deduction for the cost of the property is subject to the limitation in section 3.04(1) of this notice, the aggregate amount of the § 179D deductions allowed to all such taxpayers with respect to the building shall not exceed the amount determined under section 3.04(1) of this notice.

SECTION 4. EFFECT ON OTHER DOCUMENTS

This notice modifies Notice 2008–40, 2008–1 C.B. 725, which clarified and amplified Notice 2006–52, 2006–1 C.B. 1175.

SECTION 5. EFFECTIVE DATE

This notice is effective on March 12, 2012.

SECTION 6. DRAFTING INFORMATION

The principal author of this notice is Jennifer C. Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Ms. Bernardini at (202) 622–3110 (not a toll-free call).

Fractional Aircraft Ownership Programs Fuel Surtax

Notice 2012–27

This notice provides guidance relating to the application of the tax imposed by § 4043 of the Internal Revenue Code (Code) on fuel used in fractional program aircraft. Section 4043 was added to the Code by section 1103 of the FAA Modernization and Reform Act of 2012 (Act) (Pub. L. 112–95) and applies to fuel used after March 31, 2012.

Section 4043 imposes a $0.141-per-gallon tax on any liquid used in a fractional program aircraft as fuel (1) for the transportation of a qualified fractional owner with respect to the fractional ownership aircraft program of which such aircraft is a part, or (2) with respect to the use of such aircraft on account of such a qualified fractional owner, including use in deadhead service.

In general, a fractional ownership aircraft program is a system of aircraft ownership and exchange that involves a single program manager that manages a fleet of aircraft on behalf of fractional owners. Participation in a fractional ownership aircraft program entitles the owner to fly on any of the aircraft in the program's fleet on an on-available basis, regardless of whether the owner has an ownership interest in the aircraft in which the owner travels. The terms "fractional program aircraft," "fractional ownership aircraft program," and "qualified fractional owner" are defined in § 4043(c).

The following rules apply with respect to § 4043:

- Section 4043 imposes a tax at the rate of $0.141-per-gallon on the use of any liquid fuel in the propulsion system of a fractional program aircraft engaged in the activities described in § 4043(a).
- The fractional ownership program manager, rather than fractional owners, is liable for the tax imposed by § 4043.
- If tax is imposed by § 4043 on the fuel used in a flight, the taxes imposed by §§ 4261 and 4271 (related to amounts paid for taxable transportation) do not apply to that flight.
- Section 4043 applies in addition to any other taxes imposed on the removal, entry, use, or sale of the fuel. If tax is imposed by § 4043 on fuel used in a flight, the flight is not commercial aviation for purposes of the fuel tax imposed by § 4081.
- Fractional program aircraft are not considered used for the transportation of a qualified fractional owner, or on account of such qualified fractional owner, when they are used for flight demonstration, maintenance, or crew training. In such situations, the flight is not commercial aviation for purposes of the fuel tax imposed by § 4081. As a result, the § 4081 tax on the fuel used in the flight is imposed in the case of kerosene at the noncommercial aviation rate of $0.219 per gallon.
- Fractional ownership program managers must report the tax imposed by § 4043 on Form 720, *Quarterly Federal Excise Tax Return*, in accordance with instructions to that form. For example, for fuel used in April, May, and June of 2012, the manager must report the tax on Form 720 for the second quarter of calendar year 2012, and must file the Form 720 by July 31, 2012.
- Persons liable for the § 4043 tax are generally required to make semimonthly deposits of tax in accordance with § 40.6302(c)–1 of the Excise Tax Procedural Regulations. Thus, for example, the deposit covering the