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memorandum

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subject: Income Inclusion Amount under Section 50(d)(5)

This Chief Counsel Advice responds to your request for assistance dated August 18, 2014. This advice may not be used or cited as precedent.

ISSUE

If the lessor of a qualified rehabilitated building makes an election under § 50(d)(5) and former § 48(d) of the Internal Revenue Code to treat the taxpayer as having acquired the property for purposes of the investment credit, does the taxpayer include ratably in gross income an amount equal to 50 percent or 100 percent of the amount of the credit determined under § 47?

CONCLUSION

If the lessor of a qualified rehabilitated building makes an election to treat the taxpayer as having acquired the property for purposes of the investment credit, the taxpayer must include ratably in gross income an amount equal to 100 percent of the amount of the taxpayer's credit determined under § 47.

LAW AND ANALYSIS

Section 38(a) provides a credit against income taxes for certain business credits. Under § 38(b), business credits include the investment credit determined under § 46. Section 46 provides that, for purposes of § 38, the amount of the investment credit includes the rehabilitation credit.

Section 47(a) provides that the rehabilitation credit for any taxable year is the sum of 10 percent of the qualified rehabilitation expenditures with respect to any qualified rehabilitated building other than a certified historic structure, and 20 percent of the qualified rehabilitation expenditures with respect to any certified historic structure.

Section 47(b)(1) provides that qualified rehabilitation expenditures with respect to any qualified rehabilitated building shall be taken into account for the taxable year in which the qualified rehabilitated building is placed in service.

Section 50 provides additional rules for computing the investment credit. Section 50(c) provides rules for adjustments to basis. Section 50(d)(5) provides that, for purposes of the rules governing the investment credit, rules similar to the rules in former § 48(d) (relating to certain leased property), as in effect on the day (November 5, 1990) before the enactment of Revenue Reconciliation Act of 1990 (RRA 1990) shall apply.

Prior to the enactment of § 50 in RRA 1990, former § 48(q)(1) provided generally that if the investment credit was determined with respect to section 38 property, the basis of the property was to be reduced by 50 percent of the credit so determined. However, former § 48(q)(3) provided a special rule for the rehabilitation credit, under which the basis reduction was not limited to 50 percent but was instead the full amount of the credit determined. As originally enacted by Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248 (TEFRA), former § 48(q)(3) stated:

> In the case of any credit determined under section 46(a)(2) for any qualified rehabilitation expenditure in connection with a qualified rehabilitated building other than a certified historic structure, paragraphs (1) and (2) shall be applied without regard to the phrase '50 percent of'.

Former § 48(d)(1) provided that the lessor of property the basis of which is taken into account in figuring the investment credit may elect to treat the lessee as having acquired the property and therefore as the taxpayer for purposes of claiming the investment credit. Former § 48(d)(5)(A) provided that if a lessor elected under former § 48(d) to treat the lessee as the taxpayer who was entitled to claim the investment credit, then former § 48(q), including the basis-adjustment rule of former § 48(q)(3), would not apply to the property. Former § 48(d)(5)(B) also provided that the lessee of such property was required to include ratably in gross income over the shortest recovery period which could be applicable under § 168 with respect to such property an amount equal to 50 percent of the amount of the credit allowable under § 38 to the lessee with respect to such property.

The TEFRA Conference Report indicates that the Conference agreed to the Senate amendment, which provided for a 50 percent basis reduction for regular, energy, and certified historic structure investment tax credits. H.R. Rep. 97-760, at 481 (1982) (Conf. Rep.). With respect to the income inclusion rule, the report states:

> [W]hen lessors elect to pass through the investment credit to lessees under section 48(d), the lessor does not have to make a basis adjustment. Instead, the lessee includes in income ratably over the ACRS recovery period for the property an amount equal to one-half of the credit allowable.

Id., at 482.

Although TEFRA as enacted provided for a basis reduction for a qualified rehabilitated building of 100 percent of the rehabilitation credit and ratable inclusion for lessees of 50 percent of the rehabilitation credit, the Joint Committee's Bluebook for TEFRA states that "Congress intended that in the case of the 15- or 20-percent rehabilitation credit, the lessee must include in income an amount equal to the full credit allowable." Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982, 97th Cong., 2nd Sess. (1982), at 36, n.1.

To rectify this mismatch, former § 48(q)(3) was amended by section 306(a)(3) of the Technical Corrections Act of 1982, Pub. L. 97-448, to state that in the case of any credit determined under former § 46(a)(2) for any qualified rehabilitation expenditure in connection with a qualified rehabilitated building other than a certified historic structure, paragraphs (1) and (2) and paragraph (5) of subsection (d) shall be applied without regard to the phrase "50 percent of." Therefore, former § 48(q)(3), as amended by the Technical Corrections Act of 1982, expressly required that if a former § 48(d) election were made for a qualified rehabilitated building (other than a certified historic structure), former § 48(d) was to be applied by requiring the ratable inclusion of the entire credit amount, not merely 50 percent, of the rehabilitation credit.

The Tax Reform Act of 1986, Pub. L. 99-514, section 251(c), deleted the phrase "other than a certified historic structure" from former § 48(q)(3), thus requiring ratable inclusion of the entire amount of the rehabilitation credit for any qualified rehabilitated building with respect to which a former § 48(d) election had been made. The Bluebook for the Tax Reform Act of 1986 explains:

> A taxpayer in whose hands property qualifies for transition relief can make an election under section 48(d) to pass the credit claimed to a lessee. In applying section 48(d)(5), which coordinates the section 48(d) election with the section 48(q) basis adjustment, Congress intended the income inclusion to equal 100 percent of the credit allowed to the lessee.

Joint Committee on Taxation Staff, General Explanation of the Tax Reform Act of 1986, 100th Cong., 1st Sess. (1987), at 124.

When Congress made the 1982 technical correction to former § 48(q)(3), it did not, however, make a corresponding correction to former § 48(d)(5)(A), which continued to state that if a former § 48(d) election were made, then subsection (q), other than paragraph (4), would not apply to the property with respect to which the election was made. It could perhaps be suggested that former § 48(d)(5)(A) renders the 1982 technical correction, located in subsection (q), inapplicable both to former § 48(d) and to the rules similar to former § 48(d) that are required by § 50(d)(5). This would be an inappropriate conclusion for three reasons.

First, a purely technical reading of former § 48(d)(5)(A) would suggest that subparagraph (A) made subsection (q)(3) inapplicable only to the property and therefore only to the basis of the property but not to the portion of subsection (q)(3) that mandated the taxpayer ratably include in income the entire amount of the allowable credit. Because this portion of the rule in subsection (q)(3) applied to the taxpayer and not to the property, subsection (d)(5)(A) could not, if read literally, have the effect of making the 1982 technical correction inapplicable even though it appeared in subsection (q).

Second, even if former § 48(q)(3) were read as applying to the property rather than to the taxpayer, former § 48(d)(5)(A) could not reasonably be read to render inoperative the rule in former § 48(q)(3) that specified how former § 48(d)(5) was to apply to the rehabilitation credit. The agency's duty is to effect the expressed intent of Congress. See, e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). One canon of statutory interpretation in determining that intent is that statutes should be read to avoid making any provision "superfluous, void, or insignificant." U.S. v. Home Concrete & Supply, LLC, -- U.S. --,132 S.Ct. 1836, 1841-42, 182 L.Ed.2d 746 (2012); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). Similarly, conflicting statutes should be interpreted so as to give effect to each but to allow a later-enacted, more specific statute to amend an earlier, more general statute. See, e.g., Mangano v. United States, 529 F.3d 1243, 1247 (9th Cir. 2008). The very election that would render 1982 amendment to § 48(q)(3) relevant cannot properly be said to be the same election that renders the amendment inapplicable. It is, therefore, not reasonable to conclude that Congress intended to enact its 1982 amendment to former § 48(q)(3) null and void ab initio; nor is it any more reasonable to conclude that Congress intended in 1986 to extend to certified historic structures the applicability of a provision that can never apply. As explained in the Bluebooks both for TEFRA and for the Tax Reform Act of 1986, Congress intended that if an election was made under former § 48(d) with respect to a qualified rehabilitated building, the entire amount of the allowable rehabilitation credit from that property be ratably included in gross income under former § 48(d)(5)(B).

Finally, § 50(d) mandates that “rules similar to” the rules in former § 48(d) apply. There is no reason to presume or require that rules similar to former § 48(d) must necessarily include this merely apparent and obviously unintended anomaly. We believe that, in accord with the intent of § 50(d)(5), if the taxpayer would have used 100 percent for purposes of basis reduction under § 50(c) (were it to have applied), then the taxpayer must similarly use 100 percent as the amount of the allowable credit that must be included in gross income under the rule similar to former § 48(d)(5)(B).

Please call Robert Chapman (202) 317-5116 if you have any further questions.