

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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subject: Form 3468 and Section 47 Rehabilitation Credits

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

ISSUES

1. For purposes of the rehabilitation credit, if a passthrough entity is not an owner of a qualified rehabilitated building and certified historic structure, but is merely a conduit passing through the qualified rehabilitated expenditures (QREs) of another entity, may the IRS require the passthrough entity to file Form 3468, Investment Credit.
2. For purposes of the rehabilitation credit, if a lessor of new § 38 property makes an election under § 50(d)(5) of the Internal Revenue Code to treat the lessee as having acquired the property, may the IRS require the lessor to provide the lessee with the National Park Service (NPS) project number assigned by, and the date of the final certification of completed work received from, the Secretary of the Interior.

CONCLUSIONS

1. Yes. For purposes of the rehabilitation credit, if a passthrough entity is not an owner of a qualified rehabilitated building and certified historic structure, but is merely a

conduit passing through the QREs of another entity, the IRS may require the passthrough entity to file Form 3468.

2. Yes. For purposes of the rehabilitation credit, if a lessor of a new § 38 property makes an election under § 50(d)(5) of the Internal Revenue Code to treat the lessee of as having acquired the property, the IRS may require the lessor to provide the lessee with the NPS project number assigned by, and the date of the final certification of completed work received from, the Secretary of the Interior.

FACTS

In general, the purpose of Form 3468 is to claim the investment credit, which includes the rehabilitation credit.

The current Instructions for Form 3468 require a passthrough entity to file the form for purposes of the rehabilitation credit only if the entity is the owner of the qualified rehabilitated building and certified historic structure. The instructions do not require a passthrough entity that is not the owner to file the form.

The form's instructions state:

Generally, (a) an estate or trust whose entire qualified rehabilitation expenditures or bases in energy property are allocated to beneficiaries, (b) an S corporation, or (c) a partnership (other than an electing large partnership) does not have to complete and attach Form 3468 to its tax return. However, if the estate or trust, S corporation, or partnership is the owner of a certified historic structure, the entity must complete lines 11k and 11l of the form and attach it to its tax return even if the credit is not being claimed by the entity.

Line 11k of Form 3468 requests either the assigned NPS project number or the passthrough entity's employer identification number (EIN). Line 11l of Form 3468 requests the date that the NPS approved the Request for Certification of Completed Work.

For purposes of the rehabilitation credit, when a lessor of new § 38 property makes an election under § 50(d)(5) to treat the lessee as having acquired the property, the IRS does not currently require the lessor to provide the lessee with the NPS project number assigned by, and the date of the final certification of completed work received from, the Secretary of the Interior. The IRS currently requires the lessor to provide the lessee with a statement of election to treat the lessee as the purchaser of the property. A statement of election must include a description of the property for which the election is being made.

LAW AND ANALYSIS

Issue 1: Section 1.48-12(d)(7)(iv)(A) of the Income Tax Regulations requires a taxpayer claiming the credit for rehabilitation of a certified historic structure for a taxable year beginning after December 31, 2001, to provide with the return for the taxable year in which the credit is claimed, the NPS project number assigned by, and the date of the final certification of completed work received from, the Secretary of the Interior.

Section 1.48-12(d)(7)(iv)(B) requires a taxpayer to provide the information required under § 1.48-12(d)(7)(iv)(A) on Form 3468 filed with the taxpayer's return. In addition, the taxpayer must retain a copy of the final certification of completed work for as long as its contents may become material in the administration of any internal revenue law.

Section 1.48-12(d)(7)(iv)(C) applies the requirements of § 1.48-12(d)(7)(iv) only to the entity in the case of a credit for QREs of a partnership, S corporation, estate, or trust. Each partner, shareholder, or beneficiary claiming a credit for QREs from a passthrough entity must, however, provide the EIN of the entity on Form 3468.

Section 301.6011-1(b) authorizes the IRS to prescribe in forms, instructions, or other appropriate guidance the information or documentation required to be included with any return or any statement required to be made or other document required to be furnished under any provision of the internal revenue laws or regulations.

By its terms, § 1.48-12(d)(7)(iv) requires a passthrough entity that is the owner of a qualified rehabilitated building and certified historic structure to file Form 3468 even though it does not claim the rehabilitation credit. Section 1.48-12(d)(7)(iv)(A) requires the taxpayer claiming the credit to provide the NPS project number and the final certification date with the return for the taxable year in which the credit is claimed. Section 1.48-12(d)(7)(iv)(B) further requires the taxpayer to provide this information on Form 3468. In the case of a credit for the QREs of a passthrough entity, § 1.48-12(d)(7)(iv)(C) generally imposes these requirements on the entity only, except that each partner, shareholder, or beneficiary who claims the credit must also file Form 3468 and provide the EIN of the passthrough entity. The current Instructions for Form 3468 accordingly require a passthrough entity that is the owner of a qualified rehabilitated building and certified historic structure to file the form even though it does not claim the credit.

Nothing in § 1.48-12(d)(7)(iv) prevents the IRS from also requiring the filing of Form 3468 by a non-owner passthrough entity that passes through the QREs of another passthrough entity. When a non-owner passthrough entity is also a partner, shareholder, or beneficiary of a passthrough entity, and the non-owner passthrough entity merely serves as a conduit passing through QREs to a partner, shareholder, or beneficiary, § 1.48-12(d)(7)(iv)(C) may reasonably be interpreted to permit the IRS to require reporting by the non-owner passthrough entity. Interpreting § 1.48-12(d)(7)(iv) as a whole to impose a reporting obligation on the passthrough entity that owns the

qualified rehabilitated building and certified historic structure and on each partner, shareholder, or beneficiary who is the credit claimant, but to prevent the IRS from imposing a reporting obligation on the passthrough entity that serves as a conduit between the passthrough entity that incurs the QREs and the credit claimant would result in the IRS not receiving reporting from all entities in the ownership chain.

If the IRS does not receive reporting from every entity in the ownership chain, it cannot trace the credit from the claimant to the passthrough entity that incurs the QREs. The regulations should not be interpreted to allow this result. Section 301.6011-1(b) permits the IRS to prescribe in forms and instructions the information required to be included with any return required to be made under any provision of the internal revenue laws or regulations. Thus, the IRS may require a non-owner passthrough entity to file Form 3468 and provide the EIN of the passthrough entity from which the non-owner passthrough entity receives an allocation of QREs, and may revise its forms and instructions accordingly.

Issue 2: Section 50(d)(5) provides that, for purposes of an investment credit, rules similar to former § 48(d) (as in effect prior to the enactment of Revenue Reconciliation Act of 1990) apply. Former § 48(d)(1) permitted a lessor of property to elect to treat new § 38 property as having been acquired by the lessee for an amount equal to its fair market value (or, if the lessor and lessee were members of a controlled group of corporations, equal to the lessor's basis).

Section 1.48-4(f)(1) authorizes a lessor to make the election by filing a statement with the lessee, signed by the lessor and including the written consent of the lessee, with the following information:

- (i) The name, address, and taxpayer account number of the lessor and the lessee;
- (ii) The district director's office with which the income tax returns of the lessor and the lessee are filed;
- (iii) A description of each property for which the election is being made;
- (iv) The date on which possession of the property (or properties) is transferred to the lessee;
- (v) The estimated useful life category of the property (or properties) in the hands of the lessor, that is 3 years or more but less than 5 years, 5 years or more but less than 7 years, or 7 years or more;
- (vi) The amount for which the lessee (or sublessee) is treated as having acquired the leased property under § 1.48-4(c)(2) or (3); and
- (vii) If the lessor is itself a lessee, the name, address, and taxpayer account number of the original lessor, and the district director's office with which the income tax return of such original lessor is filed.

Section 1.48-4(g)(1) and (2) permit a lessor, in lieu of making elections on a property-by-property basis under § 1.48-4(f), to make a general election for a particular year to

treat the lessee as having purchased all properties transferred under lease by the lessor to the lessee during the lessee's taxable year. The lessor makes the general election by filing a statement with the lessee, signed by the lessor and including the written consent of the lessee, with the following information:

- (i) The name, address, and taxpayer account number of the lessor and the lessee;
- (ii) The taxable year of the lessee for which the general election is made;
- (iii) The district director's office with which the income tax returns of the lessor and the lessee are filed;
- (iv) If the lessor is itself a lessee, the name address, and taxpayer account number of the original lessor, and the district director's office with which the income tax return of such original lessor is filed.

Section 1.48-4(g)(4) requires a lessor making a general election to provide the lessee, on or before the date required for filing the statement under § 1.48-4(g)(2), with a statement containing the information required by § 1.48-4(f)(1)(iii), (iv), (v), and (vi) for all properties possession of which the lessor transfers to the lessee under lease during the taxable year.

Section 1.48-4(j) requires the lessor to attach to its income tax return a summary statement of all property leased during the taxable year for which the lessor made an election containing the following information: (1) The name, address, and taxpayer account number of the lessor; and (2) in numerical account number order, each lessee's account number, name, and address, the estimated useful life category of the property (or, if applicable, the estimated useful life expressed in years), and the basis or fair market value of the property, whichever is applicable.

For purposes of the rehabilitation credit, if a lessor of new § 38 property makes an election under § 50(d)(5) to treat the lessee as having acquired the property, the IRS may require the lessor to provide the lessee with the assigned NPS project number and the final certification date. Former § 48(d)(1) permitted a lessor of property to elect to treat new § 38 property as having been acquired by the lessee for an amount equal to its fair market value. As a result, for purposes of the rehabilitation credit, the lessee is deemed to have incurred all or a portion of the QREs incurred by the lessor and may be eligible to claim the credit.

Because the lessee is treated as having purchased the property, it is subject to the reporting requirements of § 1.48-12(d)(7)(iv). Thus, the lessee must file Form 3468 and provide the assigned NPS project number on line 11k, and the date of the final certification of completed work on line 11l pursuant to § 1.48-12(d)(7)(iv)(A). Unless the lessee receives the assigned NPS project number and the final certification date from the lessor, the lessee is unable to comply with these two reporting requirements.

Section 1.48-4(f)(1)(iii) requires the lessor to furnish the lessee with an election statement that includes a description of the property for which the election is being made. This requirement also applies to a lessor that makes a general election pursuant to § 1.48-4(g)(4). Section 301.6011-1(b) permits the IRS to prescribe the information required to be included with any statement required to be made under any provision of the internal revenue laws or regulations. Thus, for purposes of the rehabilitation credit, the IRS may require a lessor who makes an election under § 50(d)(5) to provide the lessee with the NPS project number and the final certification date as part of the description of the property for which the election is being made.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call James W. Rider at (202) 317-4137 if you have any further questions.