



TaxNewsFlash

United States



No. 2023-360
October 12, 2023

Disallowance of section 168(k) additional first-year allowance for depreciation for “excepted trade or business” (Chief Counsel legal advice memo)

The IRS publicly released a legal advice memorandum¹ (from the Office of Chief Counsel) concerning the disallowance of section 168(k) additional first-year allowance for depreciation for an “excepted trade or business” under section 163(j).

Read [20234101F](#) [PDF 135 KB] (release date of October 13, 2023, and dated June 15, 2023)

The issue at hand was whether the taxpayer may claim an additional first-year allowance for depreciation (“bonus depreciation”) under section 168(k) on property placed into service related to the construction of a solar generation plant for the tax year ended December 31, 2021.

In the legal advice memorandum, the IRS concluded that the taxpayer may not claim bonus depreciation under section 168(k) on property placed into service related to the construction of a solar generation plant because the taxpayer was primarily engaged in an excepted regulated utility trade or business.

KPMG observation

Although heavily redacted, the legal advice memorandum emphasizes that, in determining whether a separate trade or business is excepted or non-excepted for purposes of section 163(j), the 90/10 de minimis rule is required to be applied prior to the allocation rules in Reg Sec 1.163(j)-10(c).

¹ Legal advice memoranda are signed by executives in the National Office of the Office of Chief Counsel and issued to Internal Revenue Service personnel who are national program executives and managers. The memos are issued to assist IRS personnel in administering their programs by providing authoritative legal opinions on certain matters, such as industry-wide issues. The memos cannot be used or cited as precedent.

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