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Notice 2008-40

Amplification of Notice 2006-52; Deduction for Energy Efficient Commercial Buildings

Table of Contents

- SECTION 1. PURPOSE
- SECTION 2. BACKGROUND
- SECTION 3. SPECIAL RULE FOR GOVERNMENT-OWNED BUILDINGS
- SECTION 4. LIST OF APPROVED SOFTWARE PROGRAMS
- SECTION 5. CERTIFICATION REQUIREMENTS FOR INTERIM LIGHTING RULE
- SECTION 6. APPLICATION OF THE INTERIM LIGHTING RULE TO UNCONDITIONED GARAGE SPACE
- SECTION 7. CHANGES RELATING TO PARTIALLY QUALIFYING PROPERTY
- SECTION 8. PAPERWORK REDUCTION ACT
- SECTION 9. DRAFTING INFORMATION

SECTION 1. PURPOSE

This notice clarifies and amplifies Notice 2006-52, 2006-1 C.B. 1175. Notice 2006-52 provides a process that allows a taxpayer who owns a commercial building and installs property as part of the commercial building's interior lighting systems, heating, cooling, ventilation, and hot water systems, or building envelope to obtain a certification that the property satisfies the energy efficiency requirements of § 179D(c)(1) and (d) of the Internal Revenue Code. Notice 2006-52 also provides for a public list of software programs that may be used in calculating energy and power consumption for purposes of § 179D.

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. 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).

SECTION 2. BACKGROUND

Section 1331 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), enacted § 179D of the Code, which provides a deduction with respect to energy efficient commercial buildings. Section 204 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006), extends the § 179D deduction through December 31, 2008.

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 after December 31, 2005, and before January 1, 2009. Sections 179D(d)(1) and 179D(f) allow a deduction to a taxpayer for part or all of the cost of certain partially qualifying commercial building property that the taxpayer places in service after December 31, 2005, and before January 1, 2009. Partially qualifying commercial building property is property that would be energy efficient commercial building property but for the failure to achieve the 50-percent reduction in energy and power costs required under § 179D(c)(1)(D).

SECTION 3. SPECIAL RULE FOR GOVERNMENT-OWNED BUILDINGS

.01 In General. In the case of energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D) that is installed on or in property owned by a Federal, State, or local government or a political subdivision thereof, the owner of the property may allocate the § 179D deduction to the person primarily responsible for designing the property (the designer). If the allocation of a § 179D deduction to a designer satisfies the requirements of this section, the deduction will be allowed only to that designer. The deduction will be allowed to the designer for the taxable year that includes the date on which the property is placed in service.

.02 Designer of Government-Owned Buildings. A designer is a person that creates the technical specifications for installation of energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D). A designer may include, for example, an architect, engineer, contractor, environmental consultant or energy services provider who creates the technical specifications for a new building or an addition to an existing building that incorporates energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D). A person that merely installs, repairs, or maintains the property is not a designer.

.03 Allocation of the Deduction. If more than one designer is responsible for creating the technical specifications for installation of energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D) on or in a government-owned building, the owner of the building shall—

(1) determine which designer is primarily responsible and allocate the full deduction to that designer, or

(2) at the owner's discretion, allocate the deduction among several designers.

.04 Form of Allocation. An allocation of the § 179D deduction to the designer of a government-owned building must be in writing and will be treated as satisfying the requirements of this section with respect to energy efficient commercial building property (or partially qualifying commercial building property for which a deduction is allowed under § 179D) if the allocation contains all of the following:

(1) The name, address, and telephone number of an authorized representative of the owner of the government-owned building;

(2) The name, address, and telephone number of an authorized representative of the designer receiving the allocation of the § 179D deduction;

(3) The address of the government-owned building on or in which the property is installed;

(4) The cost of the property;

(5) The date the property is placed in service;

(6) The amount of the § 179D deduction allocated to the designer;

(7) The signatures of the authorized representatives of both the owner of the government-owned building and the designer or the designer's authorized representative; and

(8) A declaration, applicable to the allocation and any accompanying documents, signed by the authorized representative of the owner of the government-owned building, in the following form:

“Under penalties of perjury, I declare that I have examined this allocation, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this allocation are true, correct, and complete.”

.05 Obligations of Designer. Before a designer may claim the § 179D deduction with respect to property installed on or in a government-owned building, the designer must obtain the written allocation described in section 3.04. A designer is not required to attach the allocation to the return on which the deduction is taken. However, § 1.6001-1(a) of the Income Tax Regulations requires that taxpayers maintain such books and records as are sufficient to establish the entitlement to, and amount of, any deduction claimed by the taxpayer. Accordingly, a designer claiming a deduction under § 179D should retain the allocation as part of the taxpayer's records for purposes of § 1.6001-1(a) of the Income Tax Regulations.

.06 Tax Consequences to Designer of Government-Owned Buildings. The maximum amount of the § 179D deduction to be allocated to the designer is the amount of the costs incurred by the owner of the government-owned building to place the energy efficient commercial building property in service. A partial deduction may be allocated and computed in accordance with the procedures set forth in sections 2 and 3 of Notice 2006-52. The designer does not include any amount in income on account of the § 179D deduction allocated to the designer. In addition, the designer is not required to reduce future deductions by an amount equal to the § 179D deduction allocated to the designer. Although reducing future deductions in this manner would provide equivalent treatment for designers that are allocated a § 179D deduction and building owners that are required to reduce the basis of their energy efficient commercial building property by the amount of the § 179D deduction they claim, § 179D does not provide for any reductions other than reductions to the basis of the energy efficient commercial building property.

.07 Tax Consequences to Owner of Public Building. The owner of the public building is not required to include any amount in income on account of the § 179D deduction allocated to the designer. The owner of the public building is, however, required to reduce the basis of the energy efficient commercial building property (or partially qualifying commercial building property) by the amount of the § 179D deduction allocated.

SECTION 4. LIST OF APPROVED SOFTWARE PROGRAMS

.01 In General. The Department of Energy creates and maintains a public list of software that may be used to calculate energy and power consumption and costs for purposes of providing a certification under section 4 of Notice 2006-52. This public list appears at http://www.eere.energy.gov/buildings/info/tax_incentives.html. Software will be included on the list if the software developer submits the following information to the Department of Energy:

- (1) The name, address, and (if applicable) web site of the software developer;
- (2) The name, email address, and telephone number of the person to contact for further information regarding the software;
- (3) The name, version, or other identifier of the software as it will appear on the list;
- (4) All test results, input files, output files, weather data, modeler reports, and the executable version of the software with which the tests were conducted; and
- (5) A declaration by the developer of the software made under penalties of perjury and containing all of the following information:
 - (a) A statement that the software has been tested according to the American National Standards Institute/American Society of Heating, Refrigerating and Air-Conditioning

Engineers (ANSI/ASHRAE) Standard 140-2007 Standard Method of Test for the Evaluation of Building Energy Analysis Computer Programs.

(b) A statement that the software can model explicitly—

(i) 8,760 hours per year;

(ii) Calculation methodologies for the building components being modeled;

(iii) Hourly variations in occupancy, lighting power, miscellaneous equipment power, thermostat setpoints, and HVAC system operation, defined separately for each day of the week and holidays;

(iv) Thermal mass effects;

(v) Ten or more thermal zones;

(vi) Part-load performance curves for mechanical equipment;

(vii) Capacity and efficiency correction curves for mechanical heating and cooling equipment; and

(viii) Air-side and water-side economizers with integrated control.

(c) A statement that the software can explicitly model each of the following HVAC systems listed in Appendix G of Standard 90.1-2004:

(i) Packaged Terminal Air Conditioner (PTAC) (air source), single-zone package (through the wall), multi-zone hydronic loop, air-to-air DX coil cooling, central boiler, hot water coil.

(ii) Packaged Terminal Heat Pump (PTHP) (air source), single-zone package (through the wall), air-to-air DX coil heat/cool.

(iii) Packaged Single Zone Air Conditioner (PSZ-AC), single-zone air, air-to-air DX coil cool, gas coil, constant-speed fan.

(iv) Packaged Single Zone Heat Pump (PSZ-HP), single-zone air, air-to-air DX coil cool/heat, constant-speed fan.

(v) Packaged Variable-Air-Volume (PVAV) with reheat, multi-zone air; multi-zone hydronic loop, air-to-air DX coil, VAV fan, boiler, hot water VAV terminal boxes.

(vi) Packaged Variable-Air-Volume with parallel fan powered boxes (PVAV with PFP boxes), multi-zone air, DX coil, VAV fan, fan-powered induction boxes, electric reheat.

(vii) Variable-Air-Volume (VAV) with reheat, multi-zone air, multi-zone hydronic loop, air-handling unit, chilled water coil, hot water coil, VAV fan, chiller, boiler, hot water VAV boxes.

(viii) Variable-Air-Volume with parallel fan powered boxes (VAV with PFP boxes), multi-zone air, air-handling unit, chilled water coil, hot water coil, VAV fan, chiller, fan-powered induction boxes, electric reheat.

(d) A statement that the software can—

(i) Either directly determine energy and power costs or produce hourly reports of energy use by energy source suitable for determining energy and power costs separately; and

(ii) Design load calculations to determine required HVAC equipment capacities and air and water flow rates.

(e) A statement describing which, if any, of the following the software can explicitly model:

(i) Natural ventilation.

(ii) Mixed mode (natural and mechanical) ventilation.

(iii) Earth tempering of outdoor air.

(iv) Displacement ventilation.

(v) Evaporative cooling.

(vi) Water use by occupants for cooking, cleaning or other domestic uses.

(vii) Water use by heating, cooling, or other equipment, or for on-site landscaping.

(viii) Automatic interior or exterior lighting controls (such as occupancy, photocells, or time clocks).

(viii) Daylighting (sidelighting, skylights, or tubular daylight devices).

(ix) Improved fan system efficiency through static pressure reset.

(x) Radiant heating or cooling (low or high temperature).

(xi) Multiple or variable speed control for fans, cooling equipment, or cooling towers.

(xii) On-site energy systems (such as combined heat and power systems, fuel cells, solar photovoltaic, solar thermal, or wind).

.02 *Addresses*. Submissions under this section must be addressed as follows:

Commercial Software List
Department of Energy
Office of Building Technologies,
EE-2J
1000 Independence Ave., SW
Washington, DC 20585-0121

.03 *Updated Lists*. The software list at http://www.eere.energy.gov/buildings/info/tax_incentives.html will be updated as necessary to reflect submissions received under this section.

.04 *Removal from Published List*. The Department of Energy may, upon examination, determine that software is not sufficiently accurate to justify its use in calculating energy and power consumption and costs for purposes of providing a certification under section 4 of Notice 2006-52 and remove the software from the published list. The Department of Energy may undertake such an examination on its own initiative or in response to a public request supported by appropriate analysis of the software's deficiencies.

.05 *Effect of Removal from Published List*. Software may not be used to calculate energy and power consumption and costs for purposes of providing a certification with respect to property placed in service after the date on which the software is removed from the published list. The removal will not affect the validity of any certification with respect to property placed in service on or before the date on which the software is removed from the published list.

.06 *Public Availability of Information*. The Department of Energy may make all information provided under paragraph .01 of this section available for public review.

.07 *Applicability*. The procedures in this section supersede the procedures set forth in section 6 of Notice 2006-52 for periods after March 31, 2008. Any software that is included on the public list on March 31, 2008, will remain on the public list unless and until removed under the procedures set forth in this section.

SECTION 5. CERTIFICATION REQUIREMENTS FOR INTERIM LIGHTING RULE

.01 *In General*. Section 2.03(1)(b) of Notice 2006-52 provides an interim rule under which partially qualifying property is treated as energy efficient lighting property (the Interim Lighting Rule). Before a taxpayer may claim the § 179D deduction under the Interim Lighting Rule with respect to energy efficient lighting property installed on or in a commercial building, the taxpayer must obtain a certification with respect to the property. The certification must be provided by a qualified individual. Section 4 of Notice 2006-52 provides that the certification must include a statement that qualified computer software was used to calculate energy and power consumption and costs. That

section also provides that the certification must include a statement that the building owner has received an explanation of projected annual energy costs. These requirements are appropriate only in the case of certifications that involve calculations of energy and power consumption and cost. The Interim Lighting Rule is satisfied by a reduction in lighting power density and such a reduction may be computed using a spreadsheet or other similar software. This computation does not require qualified computer software to model the entire building system or a determination of projected annual energy costs. Accordingly, the requirements of section 4 of Notice 2006-52 do not apply to certifications under the Interim Lighting Rule.

.02 Applicable Requirements. A taxpayer is not required to attach the certification to the return on which the deduction is taken. However, § 1.6001-1(a) of the Income Tax Regulations requires that taxpayers maintain such books and records as are sufficient to establish the entitlement to, and amount of, any deduction claimed by the taxpayer. Accordingly, a taxpayer claiming a deduction under § 179D should retain the certification as part of the taxpayer's records for purposes of § 1.6001-1(a) of the Income Tax Regulations. The qualified individual providing a certification under the interim rule must document a reduction in lighting power density in a thorough and consistent manner. A certification under the Interim Lighting Rule will be treated as satisfying the requirements of § 179D(c)(1) if the certification contains all of the following:

- (1) The name, address, and telephone number of the qualified individual;
- (2) The address of the building to which the certification applies;
- (3) A statement by the qualified individual that the interior lighting systems that have been, or are planned to be, incorporated into the building—
 - (a) Achieve a reduction in lighting power density of at least 25 percent (50 percent in the case of a warehouse) of the minimum requirements in Table 9.3.1.1 or Table 9.3.1.2 (not including additional interior lighting power allowances) of Standard 90.1-2001;
 - (b) Have controls and circuiting that comply fully with the mandatory and prescriptive requirements of Standard 90.1-2001;
 - (c) Include provision for bi-level switching in all occupancies except hotel and motel guest rooms, store rooms, restrooms, public lobbies, and garages; and
 - (d) Meet the minimum requirements for calculated lighting levels as set forth in the IESNA Lighting Handbook, Performance and Application, Ninth Edition, 2000;
- (4) A statement by the qualified individual that—
 - (a) Field inspections of the building were performed by a qualified individual after the energy efficient lighting property has been placed in service;

(b) The field inspections confirmed that the building has met, or will meet, the reduction in lighting power density required by the design plans and specifications; and

(c) The field inspections were performed in accordance with inspection and testing procedures that—

(i) Have been prescribed by the National Renewable Energy Laboratory (NREL) as Energy Savings Modeling and Inspection Guidelines for Commercial Building Federal Tax Deduction; and

(ii) Are in effect at the time the certification is given;

(5) A list identifying the components of the energy efficient lighting property installed on or in the building, the energy efficiency features of the building, and its projected lighting power density;

(6) A statement that the building owner has received an explanation of the energy efficiency features of the building and its projected lighting power density;

(7) A declaration, applicable to the certification and any accompanying documents, signed by the qualified individual, in the following form:

“Under penalties of perjury, I declare that I have examined this certification, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this certification are true, correct, and complete.”

SECTION 6. APPLICATION OF THE INTERIM LIGHTING RULE TO UNCONDITIONED GARAGE SPACE

For purposes of the Interim Lighting Rule, the definition of a Building within the Scope of Standard 90.1-2001 (found in Section 5.01 of Notice 2006-52) is expanded to include a structure that—

(1) Encloses space affording shelter to persons, animals, or property within exterior walls (or within exterior and party walls) and a roof;

(2) Is not a single-family house, a multi-family structure of three stories or fewer above grade, a manufactured house (mobile home), or a manufactured house (modular); and

(3) Is unconditioned attached or detached garage space as referenced by Tables 9.3.1.1 and 9.3.1.2 of Standard 90.1-2001.

SECTION 7. CHANGES RELATING TO PARTIALLY QUALIFYING PROPERTY

.01 Energy Savings Percentages. A taxpayer may apply section 2.05 of Notice 2006-52 by substituting “10” for “16²/₃” in section 2.05(1) of such notice. If a taxpayer makes this substitution, the taxpayer must apply sections 2.03 and 2.04 of Notice 2006-52 by substituting “20” for “16²/₃” in sections 2.03(1)(a) and 2.04(1) of such notice. If § 179D is extended beyond December 31, 2008, the Internal Revenue Service and the Treasury Department expect, in the absence of other changes to § 179D, that the substitute percentages set forth in this section will be the only percentages used in determining whether property placed in service after December 31, 2008, is partially qualifying property.

.02 Limitation on Deduction for Partially Qualifying Property.

(1) *In General.* If property installed on or in a building is treated as partially qualifying property under sections 2.03, 2.04, and 2.05 of Notice 2006-52, the deduction for the cost of such property shall not exceed the greatest of the following amounts:

- (a) The sum of the deductions allowable under sections 2.03 and 2.04 of such notice;
- (b) The sum of the deductions allowable under sections 2.04 and 2.05 of such notice; or
- (c) The sum of the deductions allowable under sections 2.03 and 2.05 of such notice.

(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 7.02(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 7.02(1) of this notice.

SECTION 8. PAPERWORK REDUCTION ACT

The collections of information contained in this notice have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2004.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information are in sections 4 and 6 of Notice 2006-52 and sections 4 and 5 of this notice. This information is required to be collected and retained in order to ensure that energy efficient commercial building property meets the requirements for the deduction under § 179D. This information will be used to determine whether commercial building property for which certifications are provided is property that qualifies for the deduction.

The collection of information is required to obtain a benefit.

The likely respondents are two groups: qualified individuals providing a certification under § 179D (section 4 of Notice 2006-52 and section 5 of this notice) and software developers seeking to have software included on the public list created by the Department of Energy (section 6 of Notice 2006-52 and section 4 of this notice).

For qualified individuals providing a certification under § 179D, the likely respondents are individuals. The likely number of certifications is 20,000. The estimated burden per certification ranges from 15 to 30 minutes with an estimated average burden of 22.5 minutes. The estimated total annual reporting burden is 7,500 hours.

For software developers seeking to have software included on the public list created by the Department of Energy, the likely respondents are individuals, corporations and partnerships. The estimated total annual reporting burden is 75 hours. The estimated annual burden per respondent varies from 1 to 2 hours, depending on individual circumstances, with an estimated average burden of 1¹/₂ hours to complete the submission required to have the software added to the public list. The estimated number of respondents is 50. The estimated frequency of responses is once.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 9. 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 Jennifer C. Bernardini at (202) 622-3110 (not a toll-free call).