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Jonathan Levy, Esq., Member
Suzanne Meiners-Levy, Esq., Member

Offices
3555 Kraft Road
Suite 240
Naples, FL 34105

1300 N. Westshore Blvd.
Suite 220
Tampa, FL 33607
Phone (888) 325-1942
Fax (239) 213-0698
www.advocatetax.com

UTILIZING 100% BONUS DEPRECIATION ON AIRCRAFT PURCHASES IN 2023

Continued Incentives through 2023 and Beyond Require Careful Planning and Recordkeeping

As we find ourselves nearing the fourth quarter of 2022, five years since the passage of the Tax Cuts and Jobs Act of 2017, many private companies and individuals operating general aviation aircraft, or considering adding general aviation aircraft to their business operations, find themselves uncertain regarding the tax planning landscape for the year ahead. The TCJA created powerful incentives to continue to invest in American businesses and business property, helping to fuel an extraordinary demand for private aviation and aircraft.

UNDERSTANDING THE UNIQUE TAX CUTS AND JOBS ACT BONUS DEPRECIATION PROVISIONS

This important legislation, codified in the relevant part in 26 U.S.C. § 168(k). created new incentives for both new and used aircraft, using language that both mirrored past tax legislation, and introduced new approaches to defining purchases that qualify for bonus incentives. The primary requirements to be eligible for bonus depreciation remained familiar. The aircraft must be purchased and placed in service in furtherance of an active trade or business in the tax year in question and must be used at least 25% of the time for "qualified business use", and at least 51% of the time for total business use[1].

The legislation provides two separate avenues, codified in different subsections of the Code, for bonus depreciation for most aircraft purchases, §§ 168(k)(2)(A)(i) **and** 168(k)(2)(C). Both of these avenues apply to aircraft given the length of time they take to produce.

For those purchases that have been or are completed and placed in service before January 1, 2023, the end result of both approaches is the same. Because § 168(k)(2)(A)(i) requires fewer steps to qualified

[1] It is worth noting that this seemingly simple sentence references many involved tax concepts. Always seek the advice of a tax professional to confirm the eligibility of your business operation and categories of use,

and mirrored provisions in past tax legislation, tax professionals relied on this subsection to support the deductions.

However, beginning in tax years starting January 1, 2023, aircraft purchasers seeking to avoid a more rapid phase down of incentives must meet the additional requirements detailed in §168(k)(2)(C) in order to preserve the larger incentive and delayed phase over the next five years. This article details those additional requirements below.

TAKING 100% BONUS DEPRECIATION IN 2023: MEETING THE REQUIREMENTS OF 168(K)(2)(C)

In order to take bonus deprecation of 100% in 2023, and/or qualify for a more accelerated timetable in tax years leading up to 2028, a taxpayer must meet the previously outlined acquisition and use requirements, the aircraft must not be "transportation property[2]," and the taxpayer must meet the requirements of sub-clause (III) of 168(k)(2)(B)(i) which states, in relevant part, that:

1. The purchaser of the aircraft must have made at the time of the contract for purchase a nonrefundable deposit of the lesser or 10% of the total cost or $100,000.
2. The aircraft must have an estimated production period exceeding 4 months and a cost exceeding $200,000.

In order for the contract[3] to meet the provision requirements, it must be enforceable under State law against the taxpayer or a predecessor and may not limit damages to a specified amount.

Aircraft purchasers should have little trouble meeting both of these requirements, as almost all aircraft cost well above $200,000 and take more than four months to produce, but they must follow the requirements carefully in order to qualify. Accordingly, the written contract should be well documented and preserved, and the deposit should be clearly recorded and occur in advance of and separate from the payment of the full aircraft purchase price at closing. Failure to follow these steps will limit the taxpayer to the more quickly phased-out incentives of subsection 168(k)(2)(A)(i), which provides a maximum bonus depreciation amount of 80% in 2023.

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[2] Transportation equipment has a specific meaning within the tax code, limiting the speed of deductibility for aircraft "used in the trade or business of transporting persons or property." This limitation may apply to aircraft purchased for placement in charter operations or air taxi services, depending upon the overall use profile.

[3] Notably, this contract requirement is not identical to the requirements for a "binding contract" that would allow bonus beyond tax year 2027. Such language imposes different and distinctive requirements on both buyer and seller and should be carefully reviewed for evaluating such purchases.

Bonus Depreciation Beyond 2023

With daily talk of tax reform in Washington, few tax professionals are comfortable with crystal ball predictions for tax incentives in future years. That said, if the current law remains in place, complying with these few additional contract and deposit requirements may provide the opportunity for many business aircraft purchasers to continue to take robust bonus depreciation by delaying the 20% year-to-year phase down by a full calendar year, allowing 80% bonus in 2024, 60% in 2025 and so forth.

Seek Professional Advice and Compliance Tools and Assistance for Your Business Needs

Tax laws surrounding business aviation are complex and often seem contradictory. The TCJA further complicated the tax landscape by treating different types of businesses vastly differently in surprising, and sometimes contradictory ways. For this reason, it is important to understand the need to seek individualized advice and assistance not only at the moment of purchase or purchase planning but throughout the duration of the equipment utilization. I often have clients new to business aviation ask me whether the deductions are "worth it." Only you can determine the answer to that question, but the ability to take deductions for general aviation business expenses saves many businesses millions of dollars each year, allowing further investment in research and development, staffing, and other business needs. Working with a trusted and competent advisor, coupled with the willingness to invest a few extra minutes per flight in record-keeping time, can mean a successful business that is powered by general aviation for years to come.

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Suzanne Meiners-Levy, Esq[4].
Legal Advisor

Advocate Consulting Legal Group, PLLC is a law firm whose practice is limited to serving the needs of aircraft owners and operators relating to issues of income tax, sales tax, federal aviation regulations, and other related organizational and operational issues.

This article provides an introduction to a complex, and often ambiguous, area of law. Knowledgeable people may disagree as to outcomes in particular cases. Always consult with your advisor.

[4] Suzanne is a Managing Attorney and Shareholder at Advocate Consulting Legal Group, PLLC (ACLG). ACLG is a boutique aviation law practice focused exclusively on the tax compliance needs of general aviation aircraft owners and operators.