

Real Estate Businesses Can Revoke 163(j) Election and Cash in on Bonus Depreciation Fix

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The 2017 Tax Cuts and Jobs Act introduced a new Section 163(j) limitation on deducting business interest expense (our prior discussion of this tax law change can be found here). Specifically, businesses could only deduct net business interest in any given year equal to 30% of adjusted taxable income.

Real estate businesses could make a Section 163(j) election to elect out of this limitation, although doing so meant that they had to use the less favorable alternate depreciation system. Many real estate businesses made the Section 163(j) election as the benefit of avoiding the 30% limitation was more advantageous than the impact of using the alternate depreciation system.

Fast forward to 2020, and the passage of the Coronavirus Aid, Relief, and Economic Security Act (CARES) Act. One of the key tax changes in the CARES Act was fixing a technical glitch in the 2017 Tax Cuts and Jobs Act so that qualified improvement property was eligible retroactively for 100% bonus depreciation (this fix discussed previously here).

Many real estate businesses suddenly realized that they had the opportunity to take a full write off of past improvements to non-residential real property, provided they had

not made the Section 163(j) election.

If a taxpayer had made the Section 163(j) election, the qualified improvement property would not qualify for the 100% bonus depreciation. This is because qualified improvement property is treated as 20-year property under the alternate depreciation system, (compared to 15-year property under the standard depreciation system after the CARES Act fix), and only property with a less than 20-year recovery period could qualify for 100% bonus depreciation. As a result, many real estate businesses are left in the position of regretting their Section 163(j) election.

Happily, the IRS is giving these real estate businesses the opportunity to revisit their election. The IRS has now issued Revenue Procedure 2020-22, which allows real estate businesses the opportunity to revoke their prior Section 163(j) election. Taxpayers who revoke their election will be treated as though the election had never been made, and will now be able to benefit from the 100% bonus depreciation available for qualified improvement property.

A taxpayer revokes its prior Section 163(j) election by timely filing an amended Federal income tax return, amended Form 1065, or administrative adjustment request, as applicable, for the taxable year in which the election was made, with an election withdrawal statement. The election withdrawal statement should be titled, "Revenue Procedure 2020-22 Section 163(j)(7) Election Withdrawal."

The statement must contain the taxpayer's name, address, and social security number or employer identification number, and must state that, pursuant to Revenue Procedure 2020-22, the taxpayer is withdrawing its election under section 163(j)(7)(B) or 163(j)(7)(C), as applicable

It should be noted that the CARES Act also made changes to the Section 163(j) business interest limitation for 2019 and 2020 tax years, which will be the subject of a separate article. Stay tuned!

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