

26 CFR 1.181-2: Election to deduct production costs.
(Also Part I, §§ 168, 181, 446; 1.181, 1.446-1)

Rev. Proc. 2022-23

SECTION 1. PURPOSE

This revenue procedure provides guidance allowing a taxpayer to make late elections under §§ 168(j)(8) and 168(l)(3)(D) of the Internal Revenue Code (Code) for the taxpayer's taxable year ending in 2018 or in 2019 for certain property placed in service by the taxpayer after December 31, 2017. This revenue procedure also provides guidance allowing a taxpayer to make a late election under § 181(a)(1) of the Code for the taxpayer's taxable year ending in 2018 or in 2019 for certain film, television, or live theatrical productions commenced by the taxpayer after December 31, 2017.

SECTION 2. BACKGROUND

.01 Amendments to §§ 168(j), 168(l), and 181.

(1) Section 168(j). Section 168(j)(1) provides that for purposes of § 168(a), the applicable recovery period for qualified Indian reservation property, as defined in § 168(j)(4), is determined in accordance with the table contained in § 168(j)(2), instead of the table contained in § 168(c). Prior to amendment by § 116 of the Taxpayer

Certainty and Disaster Tax Relief Act of 2019 (2019 Act), enacted as Division Q of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, 3229 (December 20, 2019), § 168(j)(9) provided that § 168(j) did not apply to property placed in service after December 31, 2017. Section 116(a) of the 2019 Act amended § 168(j)(9) to provide that § 168(j) does not apply to property placed in service after December 31, 2020, which made § 168(j) applicable to property placed in service after December 31, 2017, and on or before December 31, 2020. Subsequent legislation further amended § 168(j)(9) to provide that § 168(j) does not apply to property placed in service after December 31, 2021, which made § 168(j) applicable to property placed in service after December 31, 2020, and on or before December 31, 2021. See § 138 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (2020 Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182, 3054 (December 27, 2020).

(2) Section 168(l). Section 168(l)(1) allows a 50-percent additional first year depreciation deduction (also sometimes referred to as a “special depreciation allowance”) for qualified second generation biofuel plant property, as defined in § 168(l)(2) and (3), for the taxable year in which the qualified second generation biofuel plant property is placed in service by the taxpayer. Prior to amendment by § 130 of the 2019 Act, § 168(l)(2)(D) defined qualified second generation biofuel plant property, in part, as property placed in service by the taxpayer before January 1, 2018. Section 130(a) of the 2019 Act amended § 168(l)(2)(D) by inserting “January 1, 2021” in place

of “January 1, 2018,” which made § 168(l)(1) applicable to property placed in service after December 31, 2017, and before January 1, 2021.

(3) Section 181. Section 181(a)(1) allows a taxpayer to elect to treat the cost of any qualified film, television, or live theatrical production, subject to the dollar limitations in § 181(a)(2), as an expense that is not chargeable to capital account (§ 181 election). Prior to amendment by § 117 of the 2019 Act, § 181(g) provided that § 181 did not apply to qualified film, television, or live theatrical productions commencing after December 31, 2017. Section 117(a) of the 2019 Act amended § 181(g) to provide that § 181 does not apply to qualified film, television, or live theatrical productions commencing after December 31, 2020, which made § 181 applicable to qualified film, television, or live theatrical productions commencing after December 31, 2017, and on or before December 31, 2020. Subsequent legislation further amended § 181(g) to provide that § 181 does not apply to qualified film, television, or live theatrical productions commencing after December 31, 2025, which made § 181 applicable to qualified film, television, or live theatrical productions commencing after December 31, 2020, and on or before December 31, 2025. See § 116 of the 2020 Act.

(4) In sum, the 2019 Act retroactively extended the application of §§ 168(j) and 168(l) to certain property placed in service by the taxpayer after December 31, 2017, and before January 1, 2021, and § 181 to a qualified film, television, or live theatrical production commencing after December 31, 2017, and before January 1, 2021. Unless otherwise provided, all references hereinafter in this revenue procedure to §§ 168(j),

168(l), and 181 are references to §§ 168(j), 168(l), and 181 as in effect on the day before the enactment date of the 2020 Act.

.02 Elections.

(1) Section 168(j)(8) election. Section 168(j)(8) allows a taxpayer to make an election not to apply § 168(j) for all property that is in the same class of property and placed in service by the taxpayer in the same taxable year (§ 168(j)(8) election). For purposes of § 168(j), the term “class of property” means each class of property described in the table contained in § 168(j)(2) (for example, 3-year property). As set forth in Rev. Proc. 2017-33, 2017-19 I.R.B. 1236, the § 168(j)(8) election generally must be made by the due date, including extensions, of the Federal tax return for the taxable year in which the taxpayer places in service the qualified Indian reservation property. Rev. Proc. 2017-33 further provides that the § 168(j)(8) election generally must be made in the manner prescribed in the instructions for Form 4562, *Depreciation and Amortization*. The instructions for Form 4562 for the 2018 taxable year and the 2019 taxable year provide that the § 168(j)(8) election is made by attaching a statement to the taxpayer’s timely filed tax return, including extensions, indicating the class of property for which the taxpayer is making the § 168(j)(8) election and, for such class, that the taxpayer is electing not to apply § 168(j).

(2) Section 168(l)(3)(D) election. Section 168(l)(3)(D) allows a taxpayer to elect not to apply § 168(l) for all property that is in the same class of property and placed in service in the same taxable year (§ 168(l)(3)(D) election). The procedures for making the § 168(l)(3)(D) election are provided in the instructions for Form 4562. The

instructions for Form 4562 for the 2018 taxable year and the 2019 taxable year provide that any election not to deduct the additional first year depreciation for any class of property, which includes the § 168(l)(3)(D) election, is made by attaching a statement to the taxpayer's timely filed tax return, including extensions, indicating the class of property for which the taxpayer is making the § 168(l)(3)(D) election and, for such class, that the taxpayer is not claiming the additional first year depreciation.

(3) Section 181 election. Section 181(c)(1) provides that the § 181 election for any qualified film, television, or live theatrical production is made in such manner as prescribed by the Secretary of the Treasury or her delegate and by the due date, including extensions, for filing the taxpayer's return of tax under chapter 1 of the Code for the taxable year in which costs of the production are first incurred.

(a) Last updated in 2012, the rules and procedures concerning a § 181 election for qualified film and television productions are set forth in § 1.181-0 through § 1.181-6 (§ 181 regulations). Congress added "qualified live theatrical production" to § 181 of the Code in 2015. As of the date of issuance of this revenue procedure, the § 181 regulations have not been updated to incorporate rules and procedures for qualified live theatrical productions.

(b) Section 1.181-2(a) provides that an owner, as defined in § 1.181-1(a)(2), generally makes the § 181 election to deduct production costs, as defined in § 1.181-1(a)(3), of a production only if that owner has not deducted in a previous taxable year any production costs for that production under any provision of the Code other than § 181. Pursuant to § 1.181-2(b)(1), the § 181 election generally must be made by the

due date, including any extension, for filing the owner's Federal income tax return for the first taxable year in which (i) any aggregate production costs, as defined in § 1.181-1(a)(4), have been paid or incurred, and (ii) the owner reasonably expects, based on all of the facts and circumstances, that the production will be set for production and will, upon completion, be a qualified production. Pursuant to § 1.181-2(c)(1), an owner must make the § 181 election separately for each production. Further, for each production to which the § 181 election applies, § 1.181-2(c)(2)(i) provides that the owner must attach a statement to the owner's Federal income tax return for the taxable year of the § 181 election stating that the owner is making the § 181 election and providing the information specified in § 1.181-2(c)(2)(i)(A) through (H). If the owner pays or incurs additional production costs in any taxable year subsequent to the taxable year for which production costs are first deducted under § 181, § 1.181-2(c)(2)(ii) provides that the owner must attach a statement to the owner's Federal income tax return for that subsequent taxable year providing the information specified in § 1.181-2(c)(2)(ii)(A) through (H).

.03 Method of accounting.

(1) Section 446(e) of the Code and § 1.446-1(e)(2) of the Income Tax Regulations require a taxpayer to secure the consent of the Commissioner of Internal Revenue (Commissioner) before changing a method of accounting for Federal income tax purposes. Section 1.446-1(e)(3)(ii) authorizes the Commissioner to prescribe administrative procedures setting forth the limitations, terms, and conditions necessary to permit a taxpayer to obtain consent to change a method of accounting.

(2) Section 1.446-1(e)(2)(ii)(d)(3)(iii) provides that the making of a late depreciation election or the revocation of a timely valid depreciation election is not a change in method of accounting, except as otherwise expressly provided by the Code, the regulations under the Code, or other guidance published in the Internal Revenue Bulletin. Section 1.446-1(e)(2)(ii)(d)(5)(iii) provides that except as otherwise expressly provided by the Code, the regulations under the Code, or other guidance published in the Internal Revenue Bulletin, no § 481 adjustment is required or permitted for a change from one permissible method of computing depreciation to another permissible method of computing depreciation.

(3) Because of the retroactive extension of the application of §§ 168(j), 168(l), and 181, guidance is needed for taxpayers that want to make late elections under §§ 168(j)(8), 168(l)(3)(D), and 181(a)(1). The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) have determined it appropriate to treat the making of late elections under §§ 168(j)(8), 168(l)(3)(D), and 181(a)(1) for certain property and certain film, television, or live theatrical productions as a change in method of accounting with a § 481(a) adjustment for a limited period of time. Accordingly, this revenue procedure permits taxpayers to make these late elections by filing an amended return or an administrative adjustment request under § 6227 of the Code (AAR), as applicable, or a Form 3115, *Application for Change in Accounting Method*. See sections 4 and 6 of this revenue procedure for the procedures to make these late elections.

SECTION 3. SCOPE

.01 This revenue procedure applies to a taxpayer that:

(1) Placed in service (a) qualified Indian reservation property after December 31, 2017, during the taxpayer's taxable year ending in 2018 (2018 taxable year) or in 2019 (2019 taxable year), or (b) qualified second generation biofuel plant property after December 31, 2017, during the taxpayer's 2018 taxable year or 2019 taxable year;

(2) Timely filed the taxpayer's Federal income tax return or Form 1065, *U.S. Return of Partnership*, for the placed-in-service year of such property; and

(3) Wants to make a (a) late § 168(j)(8) election to not apply § 168(j) for the placed-in-service year for one or more classes of qualified Indian reservation property, or (b) late § 168(l)(3)(D) election not to apply § 168(l) for the placed-in-service year for one or more classes of qualified second generation biofuel plant property.

.02 This revenue procedure also applies to a taxpayer that:

(1) Is the owner, as defined in § 1.181-1(a)(2), of a qualified film, television, or live theatrical production commencing after December 31, 2017;

(2) Wants to make a late § 181 election for the production costs of such qualified film, television, or live theatrical production for the taxpayer's 2018 taxable year or 2019 taxable year, as applicable; and

(3) Timely filed the taxpayer's Federal income tax return or Form 1065 for the taxpayer's 2018 taxable year or 2019 taxable year, as applicable.

SECTION 4. AUTOMATIC EXTENSION OF TIME TO FILE ELECTIONS UNDER SECTIONS 168(j)(8), 168(l)(3)(D), and 181(a)(1)

.01 Time and manner of making a late § 168(j)(8) election or late § 168(l)(3)(D) election. A taxpayer within the scope of section 3.01 of this revenue procedure may make a late § 168(j)(8) election or late § 168(l)(3)(D) election by filing either:

(1) An amended Federal income tax return or amended Form 1065 for the placed-in-service year of the property on or before December 31, 2022, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. A partnership subject to the centralized partnership audit regime enacted as part of the Bipartisan Budget Act of 2015 (BBA partnership) may file an AAR for the placed-in-service year of the property on or before December 31, 2022, but in no event later than the applicable period of limitations on making adjustments under § 6235 of the Code for the reviewed year as defined in § 301.6241-1(a)(8) of the Procedure and Administration Regulations. This amended return or AAR must include the adjustment to taxable income for the late election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on original or amended Federal returns or AARs for any affected succeeding taxable years; or

(2) A Form 3115 with the taxpayer's first or second timely filed original Federal income tax return or Form 1065 that is filed after April 19, 2022. A late § 168(j)(8) election or late § 168(l)(3)(D) election made pursuant to this section 4.01(2) will be treated as a change in method of accounting with a § 481(a) adjustment. The procedures for making this change in method of accounting are described in section 6 of this revenue procedure.

.02 Time and manner of making a late § 181 election. A taxpayer within the scope of section 3.02 of this revenue procedure may make the late § 181 election by filing either:

(1) An amended Federal income tax return or amended Form 1065 for the taxpayer's 2018 taxable year or 2019 taxable year, as applicable, on or before December 31, 2022, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. A BBA partnership may file an AAR for the taxpayer's 2018 taxable year or 2019 taxable year, as applicable, on or before December 31, 2022, but in no event later than the applicable period of limitations on making adjustments under § 6235 for the reviewed year as defined in § 301.6241-1(a)(8). This amended return or AAR must include the adjustment to taxable income for the late election, any collateral adjustments to taxable income or to tax liability, and the statement required under § 1.181-2(c)(2)(i). Such collateral adjustments also must be made on, and the statement required under § 1.181-2(c)(2)(ii) must be included with, original or amended Federal returns or AARs for any affected succeeding taxable years; or

(2) A Form 3115 with the taxpayer's first or second timely filed original Federal income tax return or Form 1065 that is filed after April 19, 2022. A late § 181 election made pursuant to this section 4.02(2) will be treated as a change in method of accounting with a § 481(a) adjustment. The procedures for making this change in method of accounting are described in section 6 of this revenue procedure.

SECTION 5. APPLICATION OF THE § 181 REGULATIONS TO QUALIFIED LIVE THEATRICAL PRODUCTIONS FOR 2018 AND 2019

A taxpayer within the scope of this revenue procedure may treat the § 181 regulations (as described in section 2.02(3) of this revenue procedure) as if such regulations were amended to apply to the production costs of qualified live theatrical productions for purposes of making the late § 181 election under section 4.02 of this revenue procedure for the taxpayer's 2018 taxable year or 2019 taxable year.

SECTION 6. CHANGE IN METHOD OF ACCOUNTING

.01 In general. The making of a late election under section 4.01(2) or 4.02(2) of this revenue procedure is treated as a change in method of accounting to which §§ 446(e) and 481, and the corresponding regulations, apply. A taxpayer that wants to make a late election under section 4.01(2) or 4.02(2) of this revenue procedure must use the automatic change procedures in Rev. Proc. 2015-13, 2015-5 I.R.B. 419, or its successor.

.02 New automatic change. Rev. Proc. 2022-14, 2022-7 I.R.B. 502, is modified to add new section 6.23 to read as follows:

6.23 Late elections under § 168(j)(8), § 168(l)(3)(D), and § 181(a)(1).

(1) Description of Change.

(a) Applicability. This change applies to:

(i) A taxpayer within the scope of section 3.01 of Rev. Proc. 2022-23, 2022-18 I.R.B. XXX, that wants to make the late election provided in section 4.01(2) of Rev. Proc. 2022-23 under § 168(j)(8) or § 168(l)(3)(D); or

(ii) A taxpayer within the scope of section 3.02 of Rev. Proc. 2022-23 that wants to make the late election provided in section 4.02(2) of Rev. Proc. 2022-23 under § 181(a)(1).

(b) Inapplicability. The IRS will treat the making of a late election provided in section 4 of Rev. Proc. 2022-23 under §§ 168(j)(8), 168(l)(3)(D), and 181(a)(1) as a change in method of accounting with a § 481(a) adjustment only for the taxable years specified in section 6.23(2) of this revenue procedure. This treatment does not apply to a taxpayer that makes these late elections before or after the time specified in section 6.23(2) of this revenue procedure, and any such late election is not a change in method of accounting.

(2) Time for making the change. The change under section 6.23(1)(a)(i) or (ii) of this revenue procedure must be made with the taxpayer's first or second timely filed original Federal income tax return or Form 1065, as applicable, that is filed after April 19, 2022.

(3) Certain eligibility rules inapplicable. The eligibility rules in section 5.01(1)(d) and (f) of Rev. Proc. 2015-13, 2015-5 I.R.B. 419, do not apply to a change under section 6.23(1)(a)(i) or (ii) of this revenue procedure.

(4) Certain audit protection exception temporarily inapplicable. Sections 8.02(1) and (7) of Rev. Proc. 2015-13 do not apply to a change in method of accounting made under section 6.23(1)(a)(i) or (ii) of this revenue procedure. However, sections 8.02(1) and (7) of Rev. Proc. 2015-13 continue to apply for purposes of determining the § 481(a) adjustment period provided in section 7.03(3)(b) of Rev. Proc. 2015-13.

(5) Short Form 3115.

(a) A taxpayer making a change under section 6.23(1)(a)(i) of this revenue procedure is required to complete only the following information on Form 3115 (Rev. December 2018):

- (i) The identification section of page 1 (above Part I);
- (ii) The signature section at the bottom of page 1;
- (iii) Part I;
- (iv) Part II, lines 6, 7, 8, 9, 14, and 18;
- (v) Part IV, all lines except line 25; and
- (vi) Schedule E, all lines except lines 1, 4b, 5, and 6.

(b) A taxpayer making the change under section 6.23(1)(a)(ii) of this revenue procedure is required to attach to the taxpayer's Form 3115 the statement required under § 1.181-2(c)(2)(i) and, if applicable, the statement required under § 1.181-2(c)(2)(ii), and to complete only the following information on Form 3115 (Rev. December 2018):

- (i) The identification section of page 1 (above Part I);
- (ii) The signature section at the bottom of page 1;
- (iii) Part I;
- (iv) Part II, lines 6, 7, 8, 9, 14, and 18; and
- (v) Part IV, all lines except line 25.

(6) Concurrent automatic change. A taxpayer making one or more late elections under section 4.01(2) or 4.02(2) of Rev. Proc. 2022-23 for the same year of change

should file a single Form 3115 for all such changes. The single Form 3115 must provide a single net § 481(a) adjustment for all such changes. See section 6.03(1)(b) of Rev. Proc. 2015-13 for information on making concurrent changes.

(7) Designated automatic accounting method change number. The designated automatic accounting method change number for a change to the method of accounting under this section 6.23 is “264.”

(8) Contact information. For further information regarding a change under this section 6.23, contact James Liechty at (202) 317-7005 (not a toll-free number).

SECTION 7. EFFECT ON OTHER DOCUMENTS

Section 6 of Rev. Proc. 2022-14 is modified to include the accounting method change provided in section 6.02 of this revenue procedure.

SECTION 8. EFFECTIVE DATE

This revenue procedure is effective April 19, 2022.

SECTION 9. DRAFTING INFORMATION

The principal authors of this revenue procedure are Kathleen Reed and James Liechty of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Mr. Liechty at (202) 317-7005 (not a toll-free number).