

**TITLE 26 - INTERNAL REVENUE CODE****Subtitle A - Income Taxes****CHAPTER 1 - NORMAL TAXES AND SURTAXES****Subchapter A - Determination of Tax Liability****PART IV - CREDITS AGAINST TAX****Subpart E - Rules for Computing Investment Credit****§ 49. At-risk rules****(a) General rule****(1) Certain nonrecourse financing excluded from credit base****(A) Limitation**

The credit base of any property to which this paragraph applies shall be reduced by the nonqualified nonrecourse financing with respect to such credit base (as of the close of the taxable year in which placed in service).

**(B) Property to which paragraph applies**

This paragraph applies to any property which—

- (i)** is placed in service during the taxable year by a taxpayer described in section 465 (a)(1), and
- (ii)** is used in connection with an activity with respect to which any loss is subject to limitation under section 465.

**(C) Credit base defined**

For purposes of this paragraph, the term “credit base” means—

- (i)** the portion of the basis of any qualified rehabilitated building attributable to qualified rehabilitation expenditures,
- (ii)** the basis of any energy property,
- (iii)** the basis of any property which is part of a qualifying advanced coal project under section 48A,
- (iv)** the basis of any property which is part of a qualifying gasification project under section 48B, and
- (v)** the basis of any property which is part of a qualifying advanced energy project under section 48C.

**(D) Nonqualified nonrecourse financing****(i) In general**

For purposes of this paragraph and paragraph (2), the term “nonqualified nonrecourse financing” means any nonrecourse financing which is not qualified commercial financing.

**(ii) Qualified commercial financing**

For purposes of this paragraph, the term “qualified commercial financing” means any financing with respect to any property if—

- (I)** such property is acquired by the taxpayer from a person who is not a related person,
- (II)** the amount of the nonrecourse financing with respect to such property does not exceed 80 percent of the credit base of such property, and
- (III)** such financing is borrowed from a qualified person or represents a loan from any Federal, State, or local government or instrumentality thereof, or is guaranteed by any Federal, State, or local government.

Such term shall not include any convertible debt.

**(iii) Nonrecourse financing**

For purposes of this subparagraph, the term “nonrecourse financing” includes—

- (I)** any amount with respect to which the taxpayer is protected against loss through guarantees, stop-loss agreements, or other similar arrangements, and
- (II)** except to the extent provided in regulations, any amount borrowed from a person who has an interest (other than as a creditor) in the activity in which the property is used or from a related person to a person (other than the taxpayer) having such an interest.

In the case of amounts borrowed by a corporation from a shareholder, subclause

- (II)** shall not apply to an interest as a share-holder.<sup>1</sup>

**(iv) Qualified person**

For purposes of this paragraph, the term “qualified person” means any person which is actively and regularly engaged in the business of lending money and which is not—

- (I)** a related person with respect to the taxpayer,
- (II)** a person from which the taxpayer acquired the property (or a related person to such person), or
- (III)** a person who receives a fee with respect to the taxpayer’s investment in the property (or a related person to such person).

**(v) Related person**

For purposes of this subparagraph, the term “related person” has the meaning given such term by section 465 (b)(3)(C). Except as otherwise provided in regulations prescribed by the Secretary, the determination of whether a person is a related person shall be made as of the close of the taxable year in which the property is placed in service.

**(E) Application to partnerships and S corporations**

For purposes of this paragraph and paragraph (2)—

**(i) In general**

Except as otherwise provided in this subparagraph, in the case of any partnership or S corporation, the determination of whether a partner’s or shareholder’s allocable share of any financing is nonqualified nonrecourse financing shall be made at the partner or shareholder level.

**(ii) Special rule for certain recourse financing of S corporation**

A shareholder of an S corporation shall be treated as liable for his allocable share of any financing provided by a qualified person to such corporation if—

- (I)** such financing is recourse financing (determined at the corporate level), and
- (II)** such financing is provided with respect to qualified business property of such corporation.

**(iii) Qualified business property**

For purposes of clause (ii), the term “qualified business property” means any property if—

- (I)** such property is used by the corporation in the active conduct of a trade or business,
- (II)** during the entire 12-month period ending on the last day of the taxable year, such corporation had at least 3 full-time employees who were not owner-employees (as defined in section 465 (c)(7)(E)(i)) and substantially all the services of whom were services directly related to such trade or business, and

(III) during the entire 12-month period ending on the last day of such taxable year, such corporation had at least 1 full-time employee substantially all of the services of whom were in the active management of the trade or business.

(iv) Determination of allocable share

The determination of any partner's or shareholder's allocable share of any financing shall be made in the same manner as the credit allowable by section 38 with respect to such property.

**(F) Special rules for energy property**

Rules similar to the rules of subparagraph (F) of section 46 (c)(8) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this paragraph.

**(2) Subsequent decreases in nonqualified nonrecourse financing with respect to the property**

**(A) In general**

If, at the close of a taxable year following the taxable year in which the property was placed in service, there is a net decrease in the amount of nonqualified nonrecourse financing with respect to such property, such net decrease shall be taken into account as an increase in the credit base for such property in accordance with subparagraph (C).

**(B) Certain transactions not taken into account**

For purposes of this paragraph, nonqualified nonrecourse financing shall not be treated as decreased through the surrender or other use of property financed by nonqualified nonrecourse financing.

**(C) Manner in which taken into account**

(i) Credit determined by reference to taxable year property placed in service

For purposes of determining the amount of credit allowable under section 38 and the amount of credit subject to the early disposition or cessation rules under section 50 (a), any increase in a taxpayer's credit base for any property by reason of this paragraph shall be taken into account as if it were property placed in service by the taxpayer in the taxable year in which the property referred to in subparagraph (A) was first placed in service.

(ii) Credit allowed for year of decrease in nonqualified nonrecourse financing

Any credit allowable under this subpart for any increase in qualified investment by reason of this paragraph shall be treated as earned during the taxable year of the decrease in the amount of nonqualified nonrecourse financing.

**(b) Increases in nonqualified nonrecourse financing**

**(1) In general**

If, as of the close of the taxable year, there is a net increase with respect to the taxpayer in the amount of nonqualified nonrecourse financing (within the meaning of subsection (a)(1)) with respect to any property to which subsection (a)(1) applied, then the tax under this chapter for such taxable year shall be increased by an amount equal to the aggregate decrease in credits allowed under section 38 for all prior taxable years which would have resulted from reducing the credit base (as defined in subsection (a)(1)(C)) taken into account with respect to such property by the amount of such net increase. For purposes of determining the amount of credit subject to the early disposition or cessation rules of section 50 (a), the net increase in the amount of the nonqualified nonrecourse financing with respect to the property shall be treated as reducing the property's credit base in the year in which the property was first placed in service.

**(2) Transfers of debt more than 1 year after initial borrowing not treated as increasing nonqualified nonrecourse financing**

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2010 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

For purposes of paragraph (1), the amount of nonqualified nonrecourse financing (within the meaning of subsection (a)(1)(D)) with respect to the taxpayer shall not be treated as increased by reason of a transfer of (or agreement to transfer) any evidence of any indebtedness if such transfer occurs (or such agreement is entered into) more than 1 year after the date such indebtedness was incurred.

### **(3) Special rules for certain energy property**

Rules similar to the rules of section 47 (d)(3) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this subsection.

### **(4) Special rule**

Any increase in tax under paragraph (1) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit allowable under this chapter.

## **Footnotes**

<sup>1</sup> So in original. Probably should not be hyphenated.

(Added Pub. L. 99–514, title II, § 211(a), Oct. 22, 1986, 100 Stat. 2166; amended Pub. L. 100–647, title I, § 1002(e)(1)–(3), (8)(B), Nov. 10, 1988, 102 Stat. 3367, 3369; Pub. L. 101–508, title XI, § 11813(a), Nov. 5, 1990, 104 Stat. 1388–543; Pub. L. 105–206, title VI, § 6004(g)(6), July 22, 1998, 112 Stat. 796; Pub. L. 109–58, title XIII, § 1307(c)(1), Aug. 8, 2005, 119 Stat. 1006; Pub. L. 111–5, div. B, title I, § 1302(c)(1), Feb. 17, 2009, 123 Stat. 347.)

## **References in Text**

The date of the enactment of the Revenue Reconciliation Act of 1990, referred to in subsecs. (a)(1)(F) and (b)(3), is the date of enactment of Pub. L. 101–508, which was approved Nov. 5, 1990.

## **Prior Provisions**

A prior section 49, Pub. L. 91–172, title VII, § 703(a), Dec. 30, 1969, 83 Stat. 660; Pub. L. 92–178, title I, § 101(b)(1)–(4), Dec. 10, 1971, 85 Stat. 498, 499, related to termination of rules for computing credit for investment in certain depreciable property for period beginning Apr. 19, 1969, and ending during 1971, prior to repeal by Pub. L. 95–600, title III, § 312(c)(1), Nov. 6, 1978, 92 Stat. 2826, applicable to taxable years ending after Dec. 31, 1978.

## **Amendments**

2009—Subsec. (a)(1)(C)(v). Pub. L. 111–5 added cl. (v).

2005—Subsec. (a)(1)(C)(iii), (iv). Pub. L. 109–58 added cls. (iii) and (iv) and struck out former cl. (iii) which read as follows: “the amortizable basis of any qualified timber property.”

1998—Subsec. (b)(4). Pub. L. 105–206 substituted “this chapter” for “subpart A, B, D, or G”.

1990—Pub. L. 101–508, § 11813(a), amended section generally, substituting section catchline for one which read: “Termination of regular percentage” and in text substituting present provisions for provisions relating to the nonapplicability of the regular percentage to any property placed in service after Dec. 31, 1985, for purposes of determining the investment tax credit, exceptions to such rule, the 35 percent reduction in credit for taxable years after 1986, the full basis adjustment in determining investment tax credit, and the definition of transition property and treatment of progress expenditures.

1988—Subsec. (c)(4)(B). Pub. L. 100–647, § 1002(e)(2), substituted “years” for “year” in heading and amended text generally. Prior to amendment, text read as follows: “The amount of the reduction of the regular investment credit under paragraph (3)—

“(i) may not be carried back to any taxable year, but

“(ii) shall be added to the carryforwards from the taxable year before applying paragraph (2).”

Subsec. (c)(5)(B)(i). Pub. L. 100–647, § 1002(e)(3), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: “The term ‘regular investment credit’ has the meaning given such term by section 48 (o).”

Subsec. (c)(5)(C). Pub. L. 100–647, § 1002(e)(8)(B), struck out subpar. (C) which related to portion of credits attributable to regular investment credit.

*NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2010 (see <http://www.law.cornell.edu/uscode/uscprint.html>).*

Subsec. (d)(1). Pub. L. 100–647, § 1002(e)(1), amended par. (1) generally. Prior to amendment, par. (1) read as follows: “In the case of periods after December 31, 1985, section 48 (q) (relating to basis adjustment to section 38 property) shall be applied with respect to transaction property—

“(A) by substituting ‘100 percent’ for ‘50 percent’ in paragraph (1), and

“(B) without regard to paragraph (4) thereof (relating to election of reduced credit in lieu of basis adjustment).”

### **Effective Date of 2009 Amendment**

Amendment by Pub. L. 111–5 applicable to periods after Feb. 17, 2009, under rules similar to the rules of section 48 (m) of this title as in effect on the day before Nov. 5, 1990, see section 1302(d) of Pub. L. 111–5, set out as a note under section 46 of this title.

### **Effective Date of 2005 Amendment**

Amendment by Pub. L. 109–58 applicable to periods after Aug. 8, 2005, under rules similar to the rules of section 48 (m) of this title, as in effect on the day before Nov. 5, 1990, see section 1307(d) of Pub. L. 109–58, set out as a note under section 46 of this title.

### **Effective Date of 1998 Amendment**

Amendment by Pub. L. 105–206 effective, except as otherwise provided, as if included in the provisions of the Taxpayer Relief Act of 1997, Pub. L. 105–34, to which such amendment relates, see section 6024 of Pub. L. 105–206, set out as a note under section 1 of this title.

### **Effective Date of 1990 Amendment**

Amendment by Pub. L. 101–508 applicable to property placed in service after Dec. 31, 1990, but not applicable to any transition property (as defined in section 49 (e) of this title), any property with respect to which qualified progress expenditures were previously taken into account under section 46 (d) of this title, and any property described in section 46 (b)(2)(C) of this title, as such sections were in effect on Nov. 4, 1990, see section 11813(c) of Pub. L. 101–508, set out as a note under section 45K of this title.

### **Effective Date of 1988 Amendment**

Amendment by section 1002 (e)(1)–(3) of Pub. L. 100–647 effective, except as otherwise provided, as if included in the provision of the Tax Reform Act of 1986, Pub. L. 99–514, to which such amendment relates, see section 1019(a) of Pub. L. 100–647, set out as a note under section 1 of this title.

Amendment by section 1002(e)(8)(B) of Pub. L. 100–647 applicable to taxable years beginning after Dec. 31, 1983, and to carrybacks from such years, see section 1002(e)(8)(C) of Pub. L. 100–647, set out as a note under section 38 of this title.

### **Effective Date of 1986 Amendment**

Section 211(e) of Pub. L. 99–514, as amended by Pub. L. 100–647, title I, § 1002(e)(4)–(7), Nov. 10, 1988, 102 Stat. 3367, 3368, provided that:

“(1) In general.—Except as provided in this subsection, the amendments made by this section [enacting this section and provisions set out below] shall apply to property placed in service after December 31, 1985, in taxable years ending after such date. Section 49(c) of the Internal Revenue Code of 1986 (as added by subsection (a)) shall apply to taxable years ending after June 30, 1987, and to amounts carried to such taxable years.

“(2) Exceptions for certain films.—For purposes of determining whether any property is transition property within the meaning of section 49(e) of the Internal Revenue Code of 1986—

“(A) in the case of any motion picture or television film, construction shall be treated as including production for purposes of section 203(b)(1) of this Act [enacting provisions set out as a note under section 168 of this title], and written contemporary evidence of an agreement (in accordance with industry practice) shall be treated as a written binding contract for such purposes,

“(B) in the case of any television film, a license agreement or agreement for production services between a television network and a producer shall be treated as a binding contract for purposes of section 203(b)(1)(A) of this Act, and

“(C) a motion picture film shall be treated as described in section 203(b)(1)(A) of this Act if—

“(i) funds were raised pursuant to a public offering before September 26, 1985, for the production of such film,

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2010 (see <http://www.law.cornell.edu/uscode/uscprint.html>).

“(ii) 40 percent of the funds raised pursuant to such public offering are being spent on films the production of which commenced before such date, and

“(iii) all of the films funded by such public offering are required to be distributed pursuant to distribution agreements entered into before September 26, 1985.

“(3) Normalization rules.—The provisions of subsection (b) [see Normalization Rules note below] shall apply to any violation of the normalization requirements under paragraph (1) or (2) of section 46(f) of the Internal Revenue Code of 1986 occurring in taxable years ending after December 31, 1985.

“(4) Additional exceptions.—

“(A) Subsections (c) and (d) of section 49 of the Internal Revenue Code of 1986 shall not apply to any continuous caster facility for slabs and blooms which is subject to a lease and which is part of a project the second phase of which is a continuous slab caster which was placed in service before December 31, 1985.

“(B) For purposes of determining whether an automobile manufacturing facility (including equipment and incidental appurtenances) is transition property within the meaning of section 49 (e), property with respect to which the Board of Directors of an automobile manufacturer formally approved the plan for the project on January 7, 1985 shall be treated as transition property and subsections (c) and (d) of section 49 of such Code shall not apply to such property, but only with respect to \$70,000,000 of regular investment tax credits.

“(C) Any solid waste disposal facility which will process and incinerate solid waste of one or more public or private entities including Dakota County, Minnesota, and with respect to which a bond carryforward from 1985 was elected in an amount equal to \$12,500,000 shall be treated as transition property within the meaning of section 49(e) of the Internal Revenue Code of 1986.

“(D) For purposes of section 49 of such Code, the following property shall be treated as transition property:

“(i) 2 catamarans built by a shipbuilder incorporated in the State of Washington in 1964, the contracts for which were signed on April 22, 1986 and November 12, 1985, and 1 barge built by such shipbuilder the contract for which was signed on August 7, 1985.

“(ii) 2 large passenger ocean-going United States flag cruise ships with a passenger rated capacity of up to 250 which are built by the shipbuilder described in clause (i), which are the first such ships built in the United States since 1952, and which were designed at the request of a Pacific Coast cruise line pursuant to a contract entered into in October 1985. This clause shall apply only to that portion of the cost of each ship which does not exceed \$40,000,000.

“(iii) Property placed in service during 1986 by Satellite Industries, Inc., with headquarters in Minneapolis, Minnesota, to the extent that the cost of such property does not exceed \$1,950,000.

“(E) Subsections (c) and (d) of section 49 of such Code shall not apply to property described in section 204(a)(4) of this Act [enacting provisions set out as a note under section 168 of this title].”

## Savings Provision

For provisions that nothing in amendment by Pub. L. 101–508 be construed to affect treatment of certain transactions occurring, property acquired, or items of income, loss, deduction, or credit taken into account prior to Nov. 5, 1990, for purposes of determining liability for tax for periods ending after Nov. 5, 1990, see section 11821(b) of Pub. L. 101–508, set out as a note under section 45K of this title.

## Normalization Rules

Section 211(b) of Pub. L. 99–514 provided that: “If, for any taxable year beginning after December 31, 1985, the requirements of paragraph (1) or (2) of section 46(f) of the Internal Revenue Code of 1986 are not met with respect to public utility property to which the regular percentage applied for purposes of determining the amount of the investment tax credit—

“(1) all credits for open taxable years as of the time of the final determination referred to in section 46(f)(4)(A) of such Code shall be recaptured, and

“(2) if the amount of the taxpayer’s unamortized credits (or the credits not previously restored to rate base) with respect to such property (whether or not for open years) exceeds the amount referred to in paragraph (1), the taxpayer’s tax for the taxable year shall be increased by the amount of such excess.

If any portion of the excess described in paragraph (2) is attributable to a credit which is allowable as a carryover to a taxable year beginning after December 31, 1985, in lieu of applying paragraph (2) with respect to such portion, the amount of such carryover shall be reduced by the amount of such portion. Rules similar to the rules of this subsection shall apply in the case of any property with respect to which the requirements of section 46(f)(9) of such Code are met.”

## Exception for Certain Aircraft Used in Alaska

Section 211(d) of Pub. L. 99-514 provided that:

“(1) The amendments made by subsection (a) [enacting this section and provisions set out above] shall not apply to property originally placed in service after December 29, 1982, and before August 1, 1985, by a corporation incorporated in Alaska on May 21, 1953, and used by it—

“(A) in part, for the transportation of mail for the United States Postal Service in the State of Alaska, and

“(B) in part, to provide air service in the State of Alaska on routes which had previously been served by an air carrier that received compensation from the Civil Aeronautics Board for providing service.

“(2) In the case of property described in subparagraph (A)—

“(A) such property shall be treated as recovery property described in section 208(d)(5) of the Tax Equity and Fiscal Responsibility Act of 1982 (‘TEFRA’) [section 208(d)(5) of Pub. L. 97-248, enacting provisions set out as a note under section 168 of this title];

“(B) ‘48 months’ shall be substituted for ‘3 months’ each place it appears in applying—

“(i) section 48(b)(2)(B) of the Code [26 U.S.C. 48 (b)(2)(B)], and

“(ii) section 168(f)(8)(D) of the Code [26 U.S.C. 168 (f)(8)(D)] (as in effect after the amendments made by the Technical Corrections Act of 1982 [Pub. L. 97-448] but before the amendments made by TEFRA); and

“(C) the limitation of section 168 (f)(8)(D)(ii)(III) (as then in effect) shall be read by substituting ‘the lessee’s original cost basis.’, for ‘the adjusted basis of the lessee at the time of the lease.’

“(3) The aggregate amount of property to which this paragraph shall apply shall not exceed \$60,000,000.”