

26 CFR 601.601. Rules and regulations.
(Also Part I, §163(j).)

Rev. Proc. 2018-59

SECTION 1. PURPOSE

This revenue procedure provides a safe harbor that allows taxpayers to treat certain infrastructure trades or businesses as real property trades or businesses solely for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) of the Internal Revenue Code.

SECTION 2. BACKGROUND

.01 On December 22, 2017, section 163(j) was amended by the Tax Cuts and Jobs Act, Pub. L. 115-97 (TCJA). Section 163(j), as amended by the TCJA, provides new rules limiting the amount of business interest expense that can be deducted for taxable years beginning after December 31, 2017. See TCJA § 13301(a).

.02 Under section 163(j)(1), the amount allowed as a deduction for business interest expense is limited to the sum of: (1) the taxpayer's business interest income (as

defined in section 163(j)(6)) for the taxable year; (2) 30 percent of the taxpayer's adjusted taxable income (as defined in section 163(j)(8)) for such taxable year; and (3) the taxpayer's floor plan financing interest (as defined in section 163(j)(9)) for such taxable year.

.03 The limitation under section 163(j) on the deductibility of business interest expense applies to all taxpayers with business interest (as defined in section 163(j)(5)), except for certain taxpayers (other than tax shelters under section 448(a)(3)) that meet the gross receipts test in section 448(c).

.04 Section 163(j)(5) generally provides that the term "business interest" means any interest properly allocable to a trade or business. Section 163(j)(7)(A)(ii) provides that, for purposes of the limitation on the deduction for business interest, the term "trade or business" does not include an "electing real property trade or business." Thus, for purposes of section 163(j), interest expense that is properly allocable to an electing real property trade or business is not properly allocable to a trade or business, and is not business interest expense that is subject to section 163(j)(1).

.05 The term "electing real property trade or business" under section 163(j)(7)(B) means any trade or business that is described in section 469(c)(7)(C) that makes an election to be an electing real property trade or business.

.06 Section 168(g)(1)(F) provides that an electing real property trade or business (within the meaning of section 163(j)(7)(B)) must use the alternative depreciation system for property described in section 168(g)(8). See section 163(j)(10)(A).

.07 Section 469(c)(7)(C) defines a real property trade or business as any real property development, redevelopment, construction, reconstruction, acquisition,

conversion, rental, operation, management, leasing, or brokerage trade or business.

.08 The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are aware that there may be uncertainty as to whether certain infrastructure arrangements between private persons and governmental entities under which private persons maintain or provide other services with respect to core infrastructure property such as roads, bridges, or other similar property are included in the definition of a real property trade or business under section 469(c)(7)(C).

.09 In light of the concerns relating to certain infrastructure arrangements in the context of section 163(j), this revenue procedure provides a safe harbor that allows taxpayers to treat certain trades or businesses that are conducted in connection with the designing, building, managing, operating, or maintaining of certain core infrastructure projects as real property trades or businesses for purposes of qualifying as an electing real property trade or business under section 163(j)(7)(B) (infrastructure safe harbor).

.10 The infrastructure safe harbor in this revenue procedure is based on the proposed eligibility parameters for public infrastructure projects for purposes of the private activity bond financing proposals described in the “Legislative Outline for Rebuilding Infrastructure in America,” which the White House released publicly and transmitted to Congress on February 12, 2018. See <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf> (last visited Oct. 17, 2018).

SECTION 3. SCOPE AND INFRASTRUCTURE SAFE HARBOR

.01 Scope. This revenue procedure applies to a taxpayer with a trade or business that—

(1) Is conducted by a party contractually obligated to fulfill the terms of a

specified infrastructure arrangement, as defined in section 4.11 of this revenue procedure;

(2) Is conducted in connection with fulfilling the terms of a specified infrastructure arrangement; and

(3) Would not otherwise be treated as a real property trade or business under section 163(j)(7)(B) or 469(c)(7)(C).

.02 Safe harbor for certain infrastructure trades or businesses. Taxpayers described in section 3.01 of this revenue procedure are eligible to make an election to be an electing real property trade or business for purposes of sections 163(j)(7)(B) and 168(g)(1)(F). If a taxpayer makes this election, the taxpayer must use the alternative depreciation system of section 168(g) to depreciate the property described in section 168(g)(8). The taxpayer makes the election in accordance with the time and in such form and manner as prescribed by the Commissioner in regulations, guidance published in the Internal Revenue Bulletin, or in IRS forms, instructions, or publications.

.03 Treatment as real property. For purposes of applying section 163(j) and this revenue procedure, a “specified infrastructure arrangement,” as defined in section 4.11 of this revenue procedure, is treated as real property.

.04 Special rule for certain assets. For purposes of applying section 163(j) and this revenue procedure, “qualified public infrastructure property,” as defined in section 4.08 of this revenue procedure, is treated as used in a trade or business described in section 3.01 of this revenue procedure even if such property is being designed, built, constructed, reconstructed, developed, or redeveloped.

.05 No inference. No inference should be drawn from this revenue procedure

regarding the definition of a real property trade or business for purposes of section 469.

SECTION 4. DEFINITIONS FOR THE INFRASTRUCTURE SAFE HARBOR

The following definitions apply for purposes of this revenue procedure:

.01 The term “Brownfield site” means any real property the use of which may be complicated by the presence of or potential presence of a hazardous substance, pollutant, or contaminant.

.02 The term “environmental remediation costs” means costs chargeable to a capital account that are paid or incurred to control or abate hazardous substances.

.03 The term “flood control and stormwater facilities” means any capital assets used to control floodwater or to contain stormwater.

.04 The term “government” means—

(1) The United States or any agency or instrumentality of the United States;

(2) A State or any political subdivision thereof, including the District of Columbia and any possession or territory of the United States, within the meaning of section 103 and §1.103-1; or

(3) Any foreign government.

.05 The term “foreign government” means any foreign government, any political subdivision of a foreign government, or any wholly owned agency or instrumentality of any one of the foregoing within the meaning of §1.1471-6(b).

.06 The term “hydroelectric generating facilities” means facilities used to generate electricity from water, including water impounded through a dam or diverted from a river, or pumped storage, and structures for housing generating equipment, up to, but not including, the stage of electrical transmission.

.07 The term “infrastructure property” means—

- (1) Airports, within the meaning of section 142;
- (2) Docks, and wharves, within the meaning of section 142;
- (3) Maritime and inland waterway ports, and waterway infrastructure, including dredging and navigation improvements;
- (4) Mass commuting facilities, within the meaning of section 142;
- (5) Facilities for the furnishing of water, within the meaning of section 142;
- (6) Sewage facilities, within the meaning of section 142;
- (7) Solid waste disposal facilities, within the meaning of section 142;
- (8) Facilities for the local furnishing of electrical energy or gas, within the meaning of section 142;
- (9) Local district heating or cooling facilities, within the meaning of section 142;
- (10) Qualified hazardous waste facilities, within the meaning of section 142;
- (11) High-speed intercity rail facilities, within the meaning of section 142;
- (12) Hydroelectric generating facilities, together with environmental enhancements of hydroelectric generating facilities, within the meaning of section 142;
- (13) Qualified public educational facilities, within the meaning of section 142;
- (14) Flood control and stormwater facilities;
- (15) Surface transportation facilities;
- (16) Rural broadband service facilities; and
- (17) Environmental remediation costs on Brownfield and Superfund sites.

.08 The term “qualified public infrastructure property” means infrastructure property if—

(1) The infrastructure property either—

(a) Is owned by a government; or

(b) Is not property of a trade or business described in section 163(j)(7)(A)(iv) and is owned by a private trade or business that operates under an arrangement in which rates charged for the use or services provided by the infrastructure property are subject to regulatory or contractual control by a government, or government approval; and

(2) The infrastructure property is, or will be once operational, available for use by the general public or the services provided by the infrastructure property are made available to members of the general public, including electric utility, industrial, agricultural, or commercial users on the same basis as individual members of the general public.

.09 The term “rural area” means, as confirmed by the latest decennial census of the U.S. Census Bureau, (a) any area that is not located within a city, town, or incorporated area that has a population of greater than 20,000 inhabitants or (b) an urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

.10 The term “rural broadband service facilities” means broadband telecommunications assets that provide high-speed internet access for data transmission through wired or wireless networks and that primarily serve any rural area.

.11 The term “specified infrastructure arrangement” means a contract or contracts with a term in excess of 5 years between a government and a private trade or

business under which a private trade or business has contractual responsibility to provide one or more of the functions of designing, building, constructing, reconstructing, developing, redeveloping, managing, operating, or maintaining qualified public infrastructure property.

.12 The term “Superfund site” means any site designated by the Environmental Protection Agency as a Superfund site on its national priorities list under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510 (94 Stat. 2767 (1980)), as amended.

.13 The term “surface transportation facilities” includes any road, bridge, tunnel, passenger railroad, surface freight transfer facility, and any other facility that facilitates surface transportation.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective on December 10, 2018. Taxpayers may apply the safe harbor set forth in this revenue procedure to taxable years beginning after December 31, 2017.

SECTION 6. DRAFTING INFORMATION

The principal authors of this revenue procedure are Charles Gorham, Joanna Trebat, and Zachary King of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue procedure, contact Mr. Gorham at (202) 317-5091, Ms. Trebat at (202) 317-7003, or Mr. King at (202) 317-7003 (not toll-free calls).