

100% BONUS DEPRECIATION, ADVANCED TECHNICAL IMPLICATIONS

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EXECUTIVE SUMMARY

The One Big Beautiful Bill Act of 2025 ("OBBBA") permanently allows for 100 percent bonus depreciation for new and used aircraft "acquired" and "placed in service" on or after January 20, 2025. The OBBBA replaces the current bonus depreciation phase down under the Tax Cuts and Jobs Act of 2017 ("TCJA") along with any distinction for Certain Aircraft and Transportation Property that previously allowed for a one-year delay of the TCJA's bonus depreciation phase down.¹

	One Big Beautiful Bill Act of 2025	Tax Cuts and Jobs Act of 2017	
Placed in Service Year	Applicable Percentage under General Rule	Applicable Percentage under General Rule	Certain Aircraft and Transportation Property
2025	100%	40%	60%
2026	100%	20%	40%
2027	100%	0%	20%*
2028	100%	0%	0%

* To be eligible for the one-year delay in the phase down for Certain Aircraft and Transportation Property, a written binding contract to purchase the aircraft must be entered into prior to 2027 when the aircraft will be placed in service in 2027. For clarity, only applicable for 2027.

The OBBBA provides potential advanced planning opportunities for current and prospective aircraft owners. Critically, there is a potential narrow path for aircraft owners (and future aircraft owners) that executed aircraft purchase agreements prior to the effective date under OBBBA of January 20, 2025, to claim 100% bonus depreciation. The narrow path described below requires a step-by-step, facts and circumstances analysis for accrual and cash basis taxpayers applying

Internal Revenue Code (“IRC”) and Treasury Regulations that pertain to: (i) whether the aircraft purchase agreement constitutes a Written Binding Contract, (ii) whether the aircraft being purchased can be treated as Self-Constructed Property, and (iii) when Economic Performance occurs. Readers of this article should understand that following this narrow path to achieve the desired result is a complex endeavor that requires assistance of experienced tax advisors.

BACKGROUND

The OBBBA was signed into law by President Trump on July 4, 2025.ⁱⁱ Section 70301 of the OBBBA modifies IRC Section 168(k) by (i) replacing the TCJA phasedown’s “applicable percentage” with “100 percent” and (ii) making the 100% bonus depreciation deduction permanent by removing the requirement of the asset being placed in service prior to a particular date.ⁱⁱⁱ In doing so, the OBBBA significantly modifies IRC Section 168 from the version reflective of the TCJA.^{iv}

TECHNICAL ANALYSIS

The OBBBA permits a 100% bonus depreciation deduction for qualified property acquired and placed in service after January 19, 2025.^v However, notwithstanding eligibility for 100% bonus depreciation, certain taxpayers may elect to utilize bonus depreciation under the TCJA due to facts and circumstances.^{vi} Section 70301(b)(3) provides an election to apply the applicable TCJA bonus depreciation percentage for taxpayers placing qualified property in service during the first taxable year ending after January 19, 2025.^{vii} The general rule provides for 40% bonus depreciation in 2025, with taxpayers acquiring Longer Production Period Property and Certain Aircraft being eligible for 60% bonus depreciation.^{viii}

As noted above, property must be “acquired” on or after January 20, 2025, to qualify for the new 100% bonus depreciation rate. The OBBBA provides that property shall not be treated as “acquired” after the date on which a written binding contract is entered into for such acquisition.^{ix}

However, subject to possible modification by the Department of the Treasury and the Internal Revenue Service, the Treasury Regulations provide that property that is manufactured, constructed, or produced for the taxpayer by another person under a written binding contract (that is entered into *prior* to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or for its production of income) is *not* acquired pursuant to a written binding contract but is instead considered to be self-constructed property.^x In other words, a new aircraft purchased from the manufacturer may be deemed self-constructed property, if a written binding contract was entered into *before* the manufacturer began manufacture, construction, or production of the new aircraft, excluding any preliminary activities such as planning or designing, securing financing, exploring, or researching.^{xi} Accordingly, a taxpayer that signed a written binding aircraft purchase contract on or before January 19, 2025, and before construction of the aircraft began, but took delivery of the aircraft (i.e., transfer of title) after January 19, 2025, may be eligible for 100% bonus depreciation (subject to certain additional requirements explained below).^{xii}

Written Binding Contract

The current Treasury Regulations provide that a contract is binding only if it is enforceable under state law against the taxpayer or a predecessor, and does not limit damages to a specified amount (for example, by use of a liquidated damages provision); however, a contractual provision that limits damages to an amount equal to at least 5% of the total contract price will not be treated as limiting damages to a specified amount.^{xiii} The acquisition date on which a taxpayer acquires an aircraft pursuant to a written binding contract is the later of: (1) the date on which the contract was entered into; (2) the date on which the contract is enforceable under State law; (3) if the contract has one or more cancellation periods, the date on which all cancellation periods end (a cancellation period is the number of days stated in the contract for any party to cancel the contract without penalty); or (4) if the contract has any contingency clauses, the date on which all conditions subject to such clauses are satisfied. A contingency clause is one that provides for a condition (or conditions) or action (or actions) that is within the control of any party or a predecessor.^{xiv}

Self-Constructed Property

The acquisition date of self-constructed property (which must be after January 19, 2025, to qualify for 100% bonus depreciation) is the date on which manufacture, construction, or production of property begins. For this purpose, manufacture, construction, or production begins when physical work of a significant nature begins.^{xv} The Treasury Regulations offer a safe harbor, which provides that physical work of a significant nature will be considered to begin at the time the taxpayer incurs (in the case of an accrual basis taxpayer) or pays (in the case of a cash basis taxpayer) more than 10% of the total cost of the property.^{xvi} If the taxpayer is treated under this safe harbor as having the manufacture, construction, or production of the aircraft begin after January 19, 2025, then the aircraft may qualify for 100% bonus depreciation.^{xvii} However, a taxpayer unable to satisfy the safe harbor test may nevertheless assert that physical work of a significant nature began after January 19, 2025, based on facts and circumstances.^{xviii}

Economic Performance

The current Treasury Regulations link IRC Section 168(k) to IRC Section 461, where the latter provides the general rule for determining the taxable year an amount is taken into account for determining an increase in basis or a deduction under the method of accounting used in computing taxable income.^{xix} IRC Section 461(h) provides that an amount has not been incurred (by an accrual method taxpayer) until economic performance with respect to such item occurs.^{xx} With reference to property provided to a taxpayer by another person, economic performance occurs as the person provides such property.^{xxi} As further clarified in the Treasury Regulations, an accrual method taxpayer is permitted to treat property as provided to the taxpayer when the property is delivered or accepted, or when title to the property passes.^{xxii} Notwithstanding the foregoing, the method of determining when property is provided must be used consistently from year to year, and cannot be changed without the consent of the Commissioner.^{xxiii}

In contrast, the economic performance rules are generally not applicable to a cash method taxpayer. As provided in the preceding section above, a cash method taxpayer has “acquired” a self-constructed aircraft when work of a substantial nature begins or when 10% of the total cost of the aircraft has been paid.^{xxiv} It may be more difficult under these tests for a cash method taxpayer to establish that manufacture, construction, or production of the aircraft began after January 19, 2025.

Long Term Impact

Although the OBBBA provides for 100% bonus depreciation on a permanent basis, meaning there is no scheduled phase down akin to the TCJA, the permanency of bonus depreciation always remains subject to legislative change. Presidential elections as well as congressional elections should be monitored in anticipation of potential change to the OBBBA’s reversion to 100% bonus depreciation with no expiration or phase down.

PRACTICAL APPLICATION

Contracts to Buy New Aircraft Signed Prior to January 20, 2025

Taxpayers purchasing new aircraft pursuant to contracts signed with the aircraft manufacturer prior to January 20, 2025, and with delivery and placed in service dates after January 19, 2025, may be eligible for 100% bonus depreciation, subject to an evaluation of the “acquisition” requirements for self-constructed property described above in conjunction with the taxpayer’s particular facts and circumstances. Taxpayers should review their manufacturer agreement to evaluate whether the liquidated damages therein satisfy the written binding contract requirements.^{xxv} Nevertheless, even if the written binding contract requirements are not satisfied, the taxpayer may have a tax return position to take 100% bonus depreciation. Aircraft acquisitions that are not eligible for the 100% bonus depreciation provided under the OBBBA remain eligible for the tax rules in place prior to the OBBBA modifications.^{xxvi}

Contracts to Buy New Aircraft Signed After January 19, 2025

New aircraft acquisition agreements signed with aircraft manufacturers after January 19, 2025, meet the effective date requirements to be eligible for 100% bonus depreciation, subject to aircraft delivery under the “permanent” OBBBA provisions described above.^{xxvii}

Used Aircraft

Used aircraft transactions tend to have a short duration between contract execution and closing. In the case of a contract for a used aircraft executed prior to January 20, 2025, where title to the aircraft is transferred after January 19, 2025, 100% bonus depreciation will likely not be available if the contract was a “written binding contract” under IRC Section 168(k).^{xxviii} However, taxpayers should review their aircraft purchase agreement to evaluate whether the written binding contract requirements were satisfied and, if not, whether the aircraft was not acquired prior to the OBBBA’s effective date.^{xxix}

PLANNING OPPORTUNITIES

Historically, 100% bonus depreciation has materially impacted market conditions in the business aviation industry. In anticipation of an increase in the number of aircraft buyers and prices, potential aircraft buyers should consult with an aircraft broker and/or consultant to be positioned to move quickly with an acquisition.

Notwithstanding the change in law, the historical structuring pitfalls remain:

- Adequate qualified business use under IRC Section 280F;
- At-Risk rules under IRC Section 465;

- S-Corporation debt and outside basis issues;
- Active versus passive activity rules under IRC Section 469;
- Income offset against capital gains versus income recognition at ordinary rates due to depreciation recapture under IRC Section 1245;
- Excess business losses under IRC Section 461(l);
- Family office structures and potential IRC Section 274 implications;
- Mismatching of income and deductions over different tax years; and
- States decoupling from federal bonus depreciation.

BOTTOM LINE

There may be planning opportunities that aircraft buyers may be able to use to mitigate adverse tax consequences, whether buying a new or used aircraft with a contract signed before or after January 20, 2025. Please speak with a business aviation attorney or tax advisor to evaluate such opportunities applicable to your specific facts and circumstances.

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¹ This article does not address Section 70306 of the OBBBA, which modified Section 179 by increasing the dollar limitation from \$1,000,000 to \$2,500,000 along with the dollar limitation reduction for cost in excess of \$4,000,000 increased from \$2,500,000.

² One Big Beautiful Bill Act of 2025, H.R.1, PL. 119-21

³ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301. Full Expensing For Certain Business Property.

⁴ Tax Cuts and Jobs Act of 2017, H.R.1 – An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.

⁵ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(c)(1), 70301(c)(4). Cash basis taxpayers acquiring new aircraft and all taxpayers acquiring used aircraft should carefully evaluate the acquisition date of the aircraft and the applicable bonus depreciation regime.

⁶ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(b)(3), Sec. 70301(c)(3).

⁷ Id.

⁸ IRC Section 168(k)(6); IRC Sections 168(k)(2)(B) and 168(k)(2)(C).

⁹ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(c)(4).

¹⁰ Treas. Reg. 1.168(k)-2(b)(5)(iii)(A). Taxpayers should monitor whether the Treasury Regulations published in connection with the TCJA will be superseded by potentially forthcoming Treasury Regulations.

¹¹ Id., Treas. Reg. 1.168(k)-2(b)(5)(iv)(B)(1).

¹² Id. Although reliance upon pre-existing Treasury Regulations must be monitored, the legislative history and preamble to Treas. Reg. 1.168(k)-2 offer insight into the Treasury Department and IRS' reconsideration of Prop. Reg. 1.168-2(b)(5)(iii). The proposed regulation treated property manufactured, constructed, or produced for the taxpayer by another person under a written binding contract that was entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in its trade or business or for its production of income as property acquired pursuant to a written binding contract. In response to commenters disagreement with the proposed regulation on the grounds that it was not supported by the legislative history of Section 13201 of the TCJA, was a departure from the self-constructed property rules in Treas. Reg. 1.168(k)-1(b)(4)(iii), and was administratively burdensome, the final regulation reached an alternative conclusion, that such property is self-constructed property rather than property acquired pursuant to a written binding contract.

¹³ Treas. Reg. 1.168(k)-2(b)(5)(iii)(A); Preamble to Treas. Reg. 1.168(k)-2, T.D. 9874 (Sept. 23, 2019) ("the Treasury Department and the IRS decided that the limitations should fall on both parties, the purchaser and the seller"); contra, PLR 88-200-80 ("The above cited language from the Conference Report that addresses limiting damages to a specified amount pertains to those damages for which the party claiming the benefit of the binding contract rule . . . would be liable."). Notwithstanding the IRS' interpretation in PLR 88-200-80, the Treasury Regulations do not address whether the limitation on damages would apply to both Seller and Purchaser, or just Purchaser. Accordingly, the written binding contract analysis should treat the limitation on damages as an unresolved issue.

¹⁴ Treas. Reg. 1.168(k)-2(b)(5)(iii)(B).

¹⁵ Treas. Reg. 1.168(k)-2(b)(5)(iv)(B)(1).

¹⁶ Treas. Reg. 1.168(k)-2(b)(5)(iv)(B)(2). Taxpayers should carefully assess the aircraft ownership structure to determine whether the aircraft owner will be an accrual basis taxpayer or cash basis taxpayer, which may require an evaluation of taxpayer attributes above the entity holding title to the aircraft.

¹⁷ Id.

¹⁸ Treas. Reg. 1.168(k)-2(b)(5)(iv)(B)(1).

¹⁹ Treas. Reg. 1.168(k)-2(g)(2)(iii)(A).

²⁰ IRC Section 461(h)(1).

²¹ IRC Section 461(h)(2)(A)(ii).

²² Treas. Reg. 1.461-4(d)(6)(iii).

²³ Id. Taxpayers should evaluate historical facts and circumstances to consider whether any prior year tax return positions would conflict with the tax return position sought in a manner consistent with this article. For example, reliance by a taxpayer on a written binding contract in connection with the Certain Aircraft and Longer Production Period Property exceptions to the TCJA's bonus depreciation phase down may be inconsistent with the same taxpayer seeking the tax return position that the property is self-constructed rather than acquired pursuant to a written binding contract.

²⁴ Treas. Reg. 1.168(k)-2(b)(5)(iv)(B)(2).

²⁵ Treas. Reg. 1.168(k)-2(b)(5)(iii)(A).

²⁶ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(c)(1).

²⁷ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(a).

²⁸ One Big Beautiful Bill Act of 2025, H.R.1, Chapter 3, Subchapter A, Sec. 70301(c)(4).

²⁹ Treas. Reg. 1.168(k)-2(b)(5)(iii)(A).