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EXPANDED TAX INCENTIVES FOR ENERGY-EFFICIENT CONSTRUCTION AND IMPROVEMENTS

MARTIN A. GOLDBERG AND JAMES N. MOHS

A review of real estate related provisions of the Inflation Reduction Act of 2022.

The Inflation Reduction Act of 2022[1] (the Act), included an array of tax-law changes that may not have gotten the attention they deserve.

There are several reasons why for many these changes may have been under the radar. First, as part of a much larger legislative package, much of the attention has been given to the ongoing political debates rather than individual provisions. In fact, the Act is part of a larger political saga. It's a scaled-down version, and immediate successor, to the Build Back Better Act which passed in the House of Representatives in 2021 but failed to pass in the Senate.

Second, the changes are often extensions and expansions of existing tax incentives, and it may not be clear right away how significant these extensions and expansions are in terms of dollar volume and benefit to taxpayers.

Finally, the incentives are somewhat scattered and there may be situations where individual incentives aren't significant but the effect in the aggregate is significant.

Complicating things is the fact that the tax-law provisions come along with effective dates. Significantly there are many changes starting in 2023, and anyone familiar with the laws as in effect for years up to 2022 will need to take a fresh look at the tax laws just enacted.

No question, the Act is a mixed bag in terms of both tax increases and decreases. There's now a 15% minimum corporate tax for corporations with over $1 billion in financial accounting profits,[2] and a 1% excise tax on corporate stock buybacks.[3] There's also one big area in which taxpayers come out ahead, and that's where there are expenditures for energy-efficient construction and improvements.

There are revenue-raising provisions that help fund the incentives for energy efficiency. In addition to the new corporate minimum tax which is projected to raise $222 billion and the buyback excise tax expected to raise $74 billion, there are prescription drug pricing reforms projected to raise $281 billion, expanded IRS tax enforcement funding projected to raise $101 billion, and a two-year extension of the limitation on excess business losses of noncorporate taxpayers[4] projected to raise $53 billion.[5]

The Inflation Reduction Act of 2022 is a budget reconciliation bill whose origins can be traced back to the American Rescue Plan Act of

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2021,[6] as well as the American Jobs Plan (AJP), and the American Families Plan (AFP). Each plan contained aspects of tax incentives for green energy construction, conservation, and infrastructure improvements. They further provided both individual and business incentives. The Inflation Reduction Act of 2022 is the last iteration of these developing incentives.

Expansion of the Section 179D Energy Efficient Commercial Buildings Deduction

Section 179D was first introduced as part of the Energy Policy Act of 2005[7] as a temporary provision, to be extended periodically. It was made permanent in the Consolidated Appropriations Act of 2021.[8] In its then form, Section 179D authorized a deduction of up to $1.80 per square foot, indexed for inflation, for "energy efficient commercial building property," as defined in Section 179D(c)(1). That definition includes property installed as part of:

1. the interior lighting systems,
2. the heating, cooling, ventilation, and hot water systems, or
3. the building envelope.

In order to be eligible for this deduction, the property is certified as "...being installed as part of a plan designed to reduce the total annual energy and power costs with respect to the interior lighting systems, heating, cooling, ventilation, and hot water systems of the building by 25 percent..."[9]

Increases in the Amount and Availability of the Deduction. Under the Inflation Reduction Act of 2022, the amount of the deduction is increased from the then-current $1.88 per square foot to $5.00 per square foot. In addition, the deduction can be taken every three years for additional improvements to a particular building, a significant change from prior law which permitted the deduction only once per building.

There's also a more generous rule for retrofits, that is, modifications to a building which reduce the building's energy use intensity. Under prior law, retrofits would only be eligible for the Section 179D deduction if the reduction was at least 50%. The Inflation Reduction Act reduces that standard, so that retrofits are eligible for the Section 179D deduction if they are expected to reduce the building's energy use intensity by 25% or more.

Expanded Eligibility. Prior to the Inflation Reduction Act, the Section 179D deduction was available only if the construction was by for-profit entities, or for projects owned by federal, state, and local governments. Where the projects were owned by governments or their agencies not subject to taxes, the benefit of the deduction could be allocated to the architects, engineers, or other designers responsible for the design of the building.

After the Act, the deduction is now available for buildings constructed for other tax-exempt entities, as well as for native tribal governments and Alaska native corporations.

This opens up a wide range of possible eligible construction that would have been ineligible before, including construction for churches and other religious organizations, private schools and universities, political organizations, and other tax-exempt organizations, i.e., exempt under subchapter F of the Internal Revenue Code, Sections 501-530.

As with the prior rule regarding governmental entities, these tax-exempt entities will generally have no income taxes to pay and thus no benefit from deduction. However, Section 179D(d)(3) provides for regulations "... to allow the allocation of the deduction to the person primarily responsible for designing the property in lieu of the owner of such property. Such person shall be treated as the taxpayer for purposes of this section." The economic benefit of the deduction and the incentive towards energy efficiency is thus preserved.

While this provision is no doubt pro-taxpayer, it does add an element of planning required. There may be a factual issue as to who is the person primarily responsible for designing the property. Where there is a potential for this issue should arise, there should be a clear paper trail establishing who that person is. The tax-exempt entity relinquishing this tax benefit may receive compensation from the recipient for doing so, thereby indirectly getting the benefit of the tax incentive.

New Energy Efficient Home Credit

The New Energy Efficient Home Credit is a tax credit authorized by Section 45L. It can be taken by a contractor who has constructed a "qualified new energy efficient home," that is, a newly constructed or substantially reconstructed single family or multifamily home that meets certain qualifying standards of energy efficiency. If such a home is manufactured, then the credit may be taken by the producer of the home.[10]

The Act extends this credit, which otherwise would have expired at the end of 2022, so that it is now available through 2032. Additionally, it redefines external criteria used to determine eligibility for and amount of the credit, starting in 2023.

The first criterion is "Energy Star" certification. Energy Star is a program run jointly by the Environmental Protection Agency and the Department of Energy, and certification indicates meeting certain environmental standards. Homes eligible for Energy Star certification are eligible for a $2,500 tax credit.

The second criterion is certification under the U.S. Department of Energy's Zero Energy Ready Home (ZERH) Program.

> A DOE Zero Energy Ready Home is a high-performance home that is so energy efficient that a renewable energy system could offset most or all the home's annual energy use. Each DOE Zero Energy Ready Home meets rigorous efficiency and performance criteria found in the DOE Zero Energy Ready Home National Program Requirements. Most types of new homes in the U.S. are eligible to participate in the DOE Zero Energy Ready Home program, and the homes are verified by a qualified third-party as part of the certification process.[11]

Under a provision of Section 45L added by the Inflation Reduction Act, certification under the ZERH program entitles the contractor to a credit of $5,000 for single-family homes, or $1,000 to $5,000 for units in multifamily homes.

In order to maximize the credit under Section 45L, laborers and mechanics employed in the construction of the residence need to be paid the prevailing wage for the locality where the residence is located, as determined by the Secretary of Labor.[12]

The Act contains a bonus for investments in qualified affordable housing. Ordinarily a taxpayer cannot increase the basis of property for expenditures to the extent of any credits under Section 45L. However, this disallowance of basis increase now will not apply for purposes of calculating the low-income housing credit,[13] effectively giving the taxpayer a double tax benefit for qualified affordable housing.[14]

Residential Energy Tax Credits

Two upgraded credits are now available for homeowners, the Energy Efficient Home Improvement Credit in Section 25C (formerly called the Nonbusiness Energy Property Credit) and the Residential Clean Energy Credit in Section 25D (formerly called the Residential Energy Efficient Property Credit)

Energy Efficient Home Improvement Credit. This tax credit, authorized by Section 25C, is for home improvements that reduce energy consumption, and had been scheduled to expire at the end of 2021. The Inflation Reduction Act extended it to apply through 2022, and created an extended and expanded credit for expenditures put in service from calendar years 2023 through 2032. The amount of the credit jumps from 10% in 2022 to 30% in 2023 and later years.

The credit applies to expenditures in three categories:

1. Expenditures for energy-efficient components in the building envelope, such as windows, doors, skylights, and insulation, which meet stated standards.
2. Other expenditures that increase energy efficiency, such as an electric or natural gas heat pump water heater; an electric or natural gas heat pump; a central air conditioner; a natural gas, propane, or oil water heater; or a natural gas, propane, or oil furnace or hot water boiler.
3. Expenditures for a home energy audit.[15]

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1 P.L. 117-169, 8/16/2022.

2 I.R.C. Section 55(b)(2).

3 I.R.C. Section 4501.

4 I.R.C. Section 461(l).

5 "Estimated Budgetary Effects of Public Law 117-169, to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 14, Congressional Budget Office, September 7, 2022, https://www.cbo.gov/system/files/2022-09/PL117-169_9-7-22.pdf, retrieved 12/29/2022

6 P. L. 117-2, 3/11/2021.

7 P.L. 109-58, 8/8/2005.

8 P.L. 116-220, 12/27/2020.

9 I.R.C. Section 179D(c)(1)(D)].

10 I.R.C. Section 45L(b).

11 "Zero Energy Ready Home Program," U.S. Department of Energy, Office of Energy Efficiency & Renewable Energy, https://www.energy.gov/eere/buildings/zero-energy-ready-home-program, retrieved 12/29/2022

12 I.R.C. Section 45L(g).

13 I.R.C. Section 42.

14 I.R.C. Section 45L(e).

15 I.R.C. Section 25C(a).

16 "Residential Energy Tax Credits: Changes in 2023," Congressional Research Service, November 21, 2022, https://crsreports.congress.gov/product/pdf/IN/IN12051, retrieved 12/29/2022.

17 I.R.C. Section 25C(d)(2).

18 I.R.C. Section 25D(a).

19 "Residential Energy Tax Credits: Changes in 2023," Congressional Research Service, November 21, 2022, https://crsreports.congress.gov/product/pdf/IN/IN12051, retrieved 12/29/2022

20 I.R.C. Section 25D(g).

The Inflation Reduction Act did some tweaking in the definition of qualifying expenditures. As noted by the Congressional Research Service: "Investments in roofs will no longer qualify, but certain investments in biomass stoves and air-sealing material placed in service in 2023 or later will. Improvements to, or replacement of, panelboards, sub-panelboards, branch circuits, or feeders also qualify beginning in 2023."[16][17]

In addition to the expansion of expenditures that qualify, limits on the amount of the credit have been expanded beyond that might have previously been considered nominal amounts. Instead of a lifetime limit of $500 there is now a $1,200 annual limit, with no lifetime limit for the savvy taxpayer staging projects over time.

Under prior law this credit was only available for improvements to the taxpayer's primary residence. The Inflation Reduction Act extends the availability of the credit to any residence of the taxpayer. Additionally, the Inflation Reduction Act increases the maximum annual amount of the credit allowable, and eliminates a lifetime maximum under prior law.

Residential Clean Energy Credit. This credit creates a tax incentive for taxpayers who invest in renewable energy production at their residences. As defined in the Code section, the credit is for residential expenditures for:

1. qualified solar electric property expenditures,
2. qualified solar water heating property expenditures,
3. qualified fuel cell property expenditures,
4. qualified small wind energy property expenditures,
5. qualified geothermal heat pump property expenditures, and
6. qualified battery storage technology expenditures[18]

Under prior law, there was a credit equal to 30% of qualifying expenditures only 2019, going down to 26% in the years 2020-2022 and 22% in 2023. The credit was scheduled to expire after 2023.[19]

The Inflation Reduction Act extends the credit through the end of the calendar year 2034, and increases the applicable percentage for the credit. Under the Inflation Reduction act the credit for calendar years 2022 through 2032 is 30%, not going down to 26% until 2033 and 22% in 2034.[20]

Conclusion

Whether or not these tax incentives are utilized by a particular taxpayer, it is important that a practitioner be aware of these changes, so that these are communicated to taxpayer clients in order for the client to make his or her own planning decisions.

In particular, the new laws are very precise as to effective dates, both in terms of the availability of the tax incentives as well as the amount of the tax incentives. This provides for long-term planning opportunities that the informed practitioner can provide for clients.

One final point: Given the extent of changes in these areas over the last few years, it's foreseeable that there will be further changes. Accordingly, a practitioner advising clients in any of these areas will need to keep up to date with future changes, as they may appear in legislation specifically identified as tax legislation, as well as being part of legislation not specifically focusing on changes in the tax law. ■